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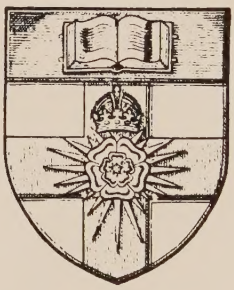

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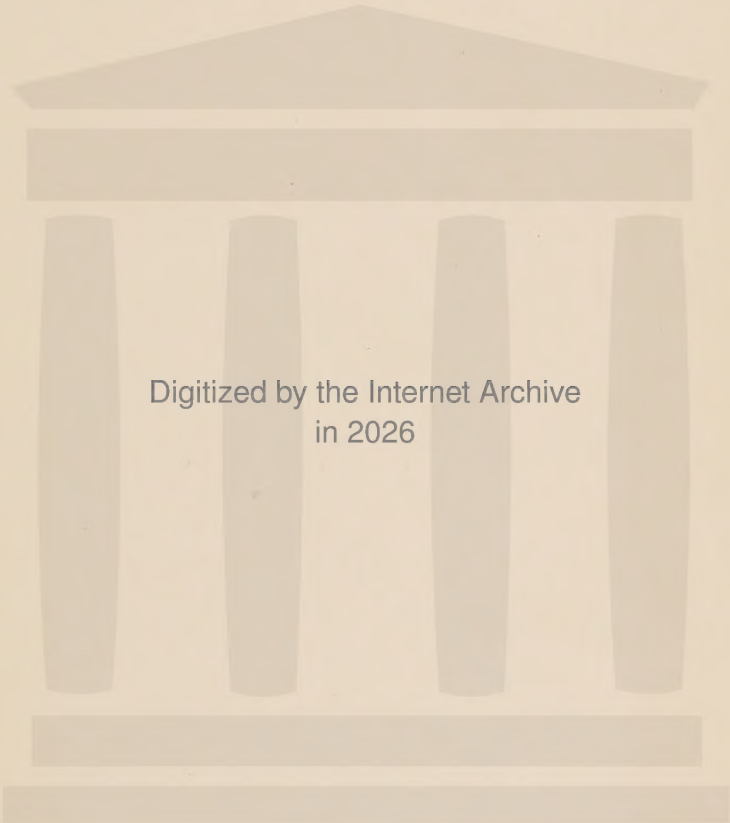
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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1920

April 30;
May 5, 6.

THE KING (on the Prosecution of the East Riding of Yorkshire County Council) *v.* THE MINISTER OF HEALTH.

Local Government—Adjustment of financial Relations—County and Ancient County Borough—Jurisdiction to appoint Arbitrator to make equitable Adjustment—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 20, 21, 22, 31, 32.

Before the Local Government Act, 1888, the borough of Hull and the city of York were counties of themselves. By s. 31 of the Act each of the boroughs named in the third schedule, which either had a population of not less than 50,000 or was a county of itself, was made, for the purposes of the Act, an administrative county of itself, and was in the Act referred to as a county borough. Hull and York were among the boroughs named in the schedule, and Hull was therein stated to be deemed, for the purpose of the Act, to be situate in the East Riding, and York in the

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North, East and West Ridings. By ss. 20, 21 and 22, the proceeds of the local taxation licences and part of the probate duty grant were to be distributed among the counties in certain proportions. Sect. 32, sub-s 1, provided that an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant and all other financial arrangements, if any, between each county and each county borough specified in the schedule as being deemed for the purposes of the Act to be situate in that county should be made, in default of agreement, by the Commissioners appointed under the Act; and sub-s. 6 provided that, if after the expiration of five years from the date of an award adjusting the financial relations of any county and borough the Local Government Board was satisfied that the adjustment had become inequitable, the Board was to appoint an arbitrator to make a new equitable adjustment. In 1891 the Commissioners made an award adjusting the distribution of the proceeds of the local taxation licences and the probate duty grant as between the county of the East Riding and the county boroughs of Hull and York, the award reciting that there were no other financial relations between the county and the two county boroughs. In 1918 the Local Government Board, on the application of Hull and York, held a local inquiry, and as the result informed the East Riding County Council that they were satisfied that the existing adjustment had become inequitable, and intended to appoint an arbitrator to make a new equitable adjustment. The County Council contended that the Board had no jurisdiction to appoint an arbitrator to make a readjustment, as Hull and York had been, before the Act of 1888, counties of themselves and still remained so, and had never for administrative purposes formed part of the East Riding, and the financial relations ordinarily existing between a county and a county borough situate therein did not exist. They applied for a writ of prohibition to restrain the Minister of Health (the successor of the Local Government Board) from appointing an arbitrator :—

Held, that the Minister of Health had jurisdiction to appoint an arbitrator to make a new equitable adjustment upon being satisfied that the original adjustment had become inequitable.

APPEAL from an order of a Divisional Court discharging a rule to show cause why a writ of prohibition should not issue to prohibit the Minister of Health from appointing an arbitrator under s. 32, sub-s. 6, of the Local Government Act, 1888 (1), to make a readjustment of the financial relations

(1) 51 & 52 Vict. c. 41, s. 32: "(1.) An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule" (the third schedule) "as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by

between the County Council of the East Riding of Yorkshire, the county borough of Kingston-upon-Hull, and the county of the city of York. The ground of the application for the rule was that there was no jurisdiction to make a readjustment, there being no financial relations between the said areas and no facts under which the distribution of the Exchequer grants could or had become inequitable.

It appeared from the affidavits in support of the rule that at the date of the passing of the Local Government Act, 1888, the cities of Kingston-upon-Hull (hereinafter called Hull) and York were each and for many years each had been a county of itself separate and distinct from the county of the East Riding, and between the last-mentioned county and the said cities there had not been any financial relations.

By s. 31 and Sch. III. of the Local Government Act, 1888, each of the cities was created for the purposes of the Act an administrative county and was in the Act referred to as a county borough ; and Hull was to be deemed to be situate in the county of the East Riding and York in the counties of the North, East and West Ridings. By s. 20 the proceeds of certain local taxation licences specified in Sch. I., and by ss. 21 and 22 a portion of the probate duties were to be paid into the local taxation account at the Bank of England, and were allocated for the purposes of the Act. By s. 7 of the Customs and Inland Revenue Act, 1890 (53 Vict. c. 8), the additional duties on spirits and part of the beer duties were to be paid to the local taxation account. By s. 32 of the Act of 1888 provision was made for an equitable adjustment respecting the distribution of the proceeds of the local taxation

the Commissioners appointed under this Act. . . . ."

"(6.) Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the Council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the board shall appoint an arbitrator ; and such arbitrator shall proceed to make a new equitable adjustment as if he were the Commissioners under this Act, and the provisions of this Act shall apply accordingly. . . . ."

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licences and probate duty grant and respecting all other financial arrangements, if any, between each county and each county borough as being deemed for the purposes of the Act to be situate in that county. By s. 46, sub-s. 1 (*a*), the Ridings of Yorkshire were to be separate administrative counties. By s. 61 the persons therein named were appointed Commissioners to determine (inter alia) the proportions in which payments were to be made to the councils of counties and county boroughs out of the local taxation account.

By an award dated November 11, 1891, which recited that there were no financial relations between the county of the East Riding of Yorkshire and the county boroughs of Hull and York in respect of which an adjustment under s. 32 was required other than the distribution of the proceeds of the local taxation licences and probate duty grant, the Commissioners made an adjustment of the proceeds of the local taxation licences and probate duty grant as between the county of the East Riding and the county boroughs of Hull and York according to the method of distribution indicated by the Act. This award was still in force except for a slight modification made by an order of March 30, 1899, consequent upon an alteration of the boundaries of the county borough of Hull. On November 22, 1917, the town clerk of Hull wrote to the Local Government Board a letter in which he stated that his council considered that the existing adjustment as between the county of the East Riding and the county boroughs of Hull and York had become inequitable, setting out certain figures as to priority payments and rateable and assessable values, and asked the Board to declare that they were satisfied that the adjustment had become inequitable, and to appoint an arbitrator under s. 32, sub-s. 6, to make a new equitable adjustment. On December 6 this letter was forwarded on by the Local Government Board to the East Riding County Council and to the Borough Council of York, and the latter expressed their concurrence in the application. On January 25, 1918, the East Riding County Council wrote to the Local Government Board that the Hull Council had

shown no reason for disturbing the existing adjustment, adding: "The county borough of Kingston-upon-Hull and the county borough of York have never for administrative purposes formed part of the East Riding. They were before the passing of the Local Government Act, 1888, and apart altogether from that Act have continued to be and still are counties of themselves, and would not even if that Act had never been passed have 'remained' in the East Riding. Consequently the East Riding Council are advised and are of opinion that the financial relations ordinarily existing between a county and county boroughs situate therein do not exist, and that accordingly the provisions of the Act as to readjustments are altogether inapplicable and there is no jurisdiction or power to make such a readjustment." On May 10, 1918, the Local Government Board informed the East Riding County Council that they had directed a local inquiry to be held by one of their inspectors upon the question whether the existing adjustment had become inequitable. On June 28, 1918, the County Council attended by counsel at the inquiry, and objected that the Local Government Board had no jurisdiction to appoint an arbitrator to make a new adjustment; that an equitable adjustment under s. 32 could only relate to the distribution of the proceeds of the local taxation licences and probate duty grant, and that no alteration had taken place with respect to either of them; and that there being no "other financial relations" between the County Council and the boroughs the award of 1891 could not and/or had not become inequitable within the meaning and scope of s. 32 or otherwise. In so attending the County Council reserved their right to raise the question in a Court of law should the Local Government Board proceed to the appointment of an arbitrator. At the inquiry evidence was given by the boroughs to support the figures in the letter of November 22, 1917. No evidence was called by the County Council to contradict those figures. By a letter dated August 15, 1918, the Local Government Board stated that they were satisfied that the existing adjustments had become inequitable, but before proceeding to the appointment of an

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arbitrator they suggested that the matter should be further considered by the councils concerned. In a letter dated February 13, 1919, the East Riding County Council adhered to their position, and by letter dated May 31, 1919, the Local Government Board intimated their intention to proceed to the appointment of an arbitrator to make the adjustment.

By the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), s. 3, all the powers of the Local Government Board were transferred to the Minister of Health, and by s. 11 and an Order in Council the Act came into operation on July 1, 1919.

The rule nisi for a prohibition was then obtained on behalf of the East Riding County Council.

In opposition to the rule the Town Clerk of Hull made an affidavit in which he stated (inter alia) that the method of distribution of the proceeds of the local taxation licences and probate duty grant between each county and the county boroughs deemed to be situate therein adopted by the Commissioners appointed by s. 61 of the Act of 1888, as stated by them in their report (dated August 15, 1892), was to treat the total proceeds of the licences and grant collected in, or allocated under s. 22 for, the county and boroughs as a common fund, and to give thereout to each the annual amount received prior to the passing of the Act out of the grants discontinued after the passing of the Act (including the grant in respect of half the cost of main roads) together with the amount payable under s. 26, and to divide the remainder of the fund among the county and county boroughs in proportion to their rateable values. The Commissioners further stated in their report that they determined that the figures of the various accounts should be fixed for a period of five years or until altered under the provisions of s. 32, sub-s. 6. The award of November 11, 1891, adopted the method of distribution laid down by the Commissioners in their report, and was in accordance with the contentions then put forward by the East Riding County Council.

The Divisional Court (Earl of Reading C.J., Avory and

Sankey JJ.) discharged the rule. The County Council appealed.

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Disturnal K.C. and *W. J. Jeeves K.C.* for the East Riding County Council. The facts alleged by the respondents show no cause for a new adjustment under s. 32, sub-s. 6, of the Local Government Act, 1888. Before the passing of that Act, grants used to be made out of the Exchequer in aid of local rates, which were raised to meet expenses incurred on behalf of a county including those boroughs within its area which were not themselves administrative counties. On the passing of the Act of 1888 these grants ceased and certain duties were made payable to and in certain circumstances leviable by the councils of those administrative counties: see ss. 20, 21, 22, of the Act. Then by s. 31 certain boroughs which up to June 1, 1888, were part of the administrative counties in which they were situate, were made administrative counties of themselves and apart from the counties of which they had up to that date formed part. The question then arose, What provision should be made for those expenses formerly incurred by the administrative county on account of itself and the boroughs which formed part of it. Sect. 32 was passed to meet that difficulty. By sub-s. 1 an equitable adjustment respecting the distribution of the proceeds of the duties and all other financial relations between each county and each county borough was to be made; and sub-s. 6 provides for a new equitable adjustment if after the end of five years the adjustment has become inequitable. These provisions are very applicable where the borough in question was at the passing of the Act part of the county, and first became an administrative county by virtue of the Act; but they have no application whatever to a borough which was itself a county at the passing of the Act; for what financial relations could such a borough have had with the surrounding county? There were no joint assets and joint liabilities. York and Hull were counties at the passing of the Act.

Between those boroughs, or either of them, on the one hand,

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and the county on the other there were no financial relations. The award of November 11, 1891, recited that there were no financial relations other than the distribution of the proceeds of the local taxation licences and probate duty grant, and these were finally distributed between the county and Hull and York in the proportions specified in ss. 20 and 22 of the Act: see also s. 34. The proportion of the spirit and beer duties, distributable under s. 7 of the Customs and Inland Revenue Act, 1890 (53 Vict. c. 8), were also finally distributed amongst the counties in the same way as the proceeds of the probate duties were distributed—namely, in proportion to the grants in aid received by each county during the financial year before the passing of the Act of 1888. There are no financial relations to adjust; there were no joint burdens or liabilities which are no longer to be joint: *West Hartlepool Corporation* v. *Durham County Council.* (1) There is nothing to adjust. There is therefore no jurisdiction to appoint an arbitrator.

Sir Ernest Pollock S.-G. and *Branson* for the Minister of Health. It does not follow that because two areas constitute separate counties they can therefore have no financial relations. A person who has his residence in Hertfordshire and his business in Middlesex may pay in Middlesex the duty for armorial bearings. That would give Hertfordshire an equitable claim against Middlesex. Again, an equitable adjustment may become necessary where a borough maintains a separate police force. By s. 24, sub-s. 2 (*i*) and (*j*), the County Council is to transfer to the police account of the county fund a sum equal to one-half of the costs of the pay and clothing of the police of the county during the preceding year, and to pay to the council of each borough maintaining a separate police force one-half of the costs of the pay and clothing of the police of that borough during the preceding year.

It cannot be doubted that York and Hull were and are boroughs maintaining each a separate police force within the meaning of s. 24, sub-s. 2 (*j*). If these boroughs become

(1) [1907] A. C. 246, 250, 254.

more populous the cost of paying and clothing the borough police forces may increase beyond what was contemplated at the date of the Act. Formerly the grant in aid from the Exchequer varied with the varying conditions. The system substituted by the Act is more rigid and is ill adapted to correct inequalities that arise from time to time. Hence the necessity for s. 32 of the Act. By sub-s. 1 there was to be within twelve months after the appointed day "an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county." Therefore, whether York and Hull were or were not part of the East Riding at the passing of the Act, they are to be deemed to be part thereof for the purposes of the Act, and there is to be an equitable adjustment respecting the distribution of the proceeds of the licences and probate duty grant "and respecting all other financial relations, if any." Then, by s. 32, sub-s. 6, if at any time after the end of five years an adjustment is shown to be inequitable a new adjustment is to be made. An adjustment of the local taxation licences is an adjustment of a financial relation.

Sect. 23 deals with the application of the duties on local taxation licences and the probate duty grant, which are further referred to in s. 24. Sect. 31 makes no distinction between boroughs which were counties before the Act and the new county boroughs. In making the adjustment the Commissioners had, by s. 61, sub-s. 7, an absolute discretion, and might have taken any basis they pleased.

[They were stopped.]

R. M. Montgomery K.C. and *William Allen* for the county of the borough of Hull.

F. T. Villiers Bayly for the county of the city of York.

Disturnal K.C. in reply.

BANKES L.J. This is an appeal from a decision of the Divisional Court discharging a rule nisi for a prohibition

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directed to the Minister of Health prohibiting him from appointing an arbitrator under s. 32, sub-s. 6, of the Local Government Act, 1888, to make a readjustment of the financial relations between the County Council of the East Riding of Yorkshire, the county borough of Kingston-upon-Hull, and the county of the city of York.

The Local Government Act, 1888, made a change in reference to grants by the State in aid of certain local expenditure. Before that Act the system adopted had been for the Treasury to make grants in aid of local expenditure in respect of certain objects, and we are told that the amount of those grants in aid was regulated by the amount of the local expenditure upon those objects, and we are also told that, as a matter of practice, the amount of the grants was dealt with each year in the Appropriation Act. The Local Government Act, 1888, abolished those grants in aid, and substituted for them certain contributions from specified sources—namely, the local taxation licences and part of the probate duty, and by s. 7 of the Customs and Inland Revenue Act, 1890, there was added the additional whiskey and beer duties. The Act of 1888 specified how those moneys should be distributed.

With regard to the local taxation licences, s. 20, sub-s. 1, of the Act of 1888 directs the Commissioners of Inland Revenue to pay into the Bank of England to the local taxation account such sums as may be ascertained to be the proceeds of the duties collected by the Commissioners in each administrative county on certain licences called local taxation licences; and sub-s. 2 provides: "The amount ascertained as aforesaid to have been collected in each county in respect of duties on local taxation licences shall, from time to time, be certified by the Commissioners of Inland Revenue, and paid under the direction of the Local Government Board out of the local taxation account to the council of such county." With regard to the probate duties, s. 21 fixed the amount, and s. 22 provides for the distribution of that amount in these words: "The sums paid in pursuance of this Act to the local taxation account, in respect of the proceeds of the

probate duties (in this Act referred to as the 'probate duty grant'), shall, until Parliament otherwise determine, be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board certify to have been received by each county during the financial year ending the 31st day of March next before the passing of this Act out of the grants heretofore made out of the Exchequer in aid of local rates, which will cease to be granted after the passing of this Act." Therefore, the distribution of the local taxation licences was to be local, having reference to the amount collected in each county; and the distribution of the probate duties (and afterwards the whiskey and beer duties) was to be with reference to the amounts which were paid in the year next before the passing of the Act out of grants in aid. If the Act had stopped there, nothing more would have had to be done in reference to the distribution of these sums of money except to follow those provisions of the Act. But s. 32, sub-s. 1, of the Act provides for an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the third schedule as being deemed, for the purposes of the Act, to be situate in the county.

The two county boroughs which are concerned in this dispute are York and Kingston-upon-Hull. They are both included in the third schedule. They are both, by the terms of the Act and the schedule deemed, for the purposes of the Act, to be situate in the county, and that is so, although they differ materially from other county boroughs created by the Act by reason of the fact that they are both, apart from the Act, counties of themselves. The Act in its terms contemplates an equitable adjustment as between the county and each of these two county boroughs, and it provides that this equitable adjustment is to be made by Commissioners appointed under the Act. Mr. Disturnal contended that, there being no financial relations between these two county boroughs and the East Riding at the time of the passing of

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the Act, no adjustment ought to have been made at all between them, because there was nothing to adjust. I do not agree with that contention, because it seems to me that whatever may have been the relations between any county and county borough specified in the schedule, the section is mandatory; and it requires that unless there is an agreement between the councils of each county and each borough there must be an adjustment by the Commissioners in order to fix the amounts which will be payable respectively to the county and to the county borough. I disagree therefore with the contention that the only ground upon which there can be an equitable adjustment is that there were at the passing of the Act financial relations between the county and the county borough. I ought to add that by s. 61 the Commissioners are given an absolute discretion in the matter of making these equitable adjustments.

What happened in the case of the East Riding and these two boroughs was this: The Commissioners on November 11, 1891, made an equitable adjustment. They recited in their adjustment that there were no financial relations between the county of the East Riding of Yorkshire and the county boroughs of Kingston-upon-Hull and York in respect of which an adjustment was required, other than the distribution of the proceeds of the local taxation licences and probate duty grant. Mr. Disturnal relied upon that as part of his argument that there was nothing then, and there is nothing now, to adjust, and therefore the Minister of Health can have no jurisdiction to appoint an arbitrator. As I have already pointed out, it appears to me that it is not essential to justify the original adjustment, or any further equitable adjustment, that there should be what are described in the Act as financial relations between the county and the county borough other than the distribution of the local taxation licences, probate duty grant, and spirit and beer duties. Then we are told that the basis on which the Commissioners made these and other adjustments was that they took the amount of the grants in aid which had been made in the year before the passing of the Act, and awarded that the available amounts

from these new duties should be distributed in proportion to the amount of the previously existing grants in aid, and that any surplus should be divided and paid in proportion to the rateable value of the areas with which they were dealing. Mr. Disturnal said that they had no jurisdiction to do that as it was contrary to the provisions of the Act. It does not seem to me that, in considering the application before us, we need inquire into that. They made this adjustment which proceeded on the basis which I have just described, and that has remained in force and has been acted upon down to the present time. On November 22, 1917, the county borough of Hull made application to the Local Government Board for a new equitable adjustment, and in the letter making the application the ground upon which it was alleged that the existing adjustment was inequitable, and a new adjustment was required, was the difference in the figures represented by what are called in the letter the priority payments, and in the alteration in the rateable values of the areas in question. Sect. 32, sub-s. 6, provides for a new equitable adjustment, if necessary, after the expiration of five years from the date of the original adjustment. Upon that application being made, the Local Government Board directed a local inquiry in order that they might satisfy themselves as to whether or not the original adjustment had become inequitable. That inquiry was held on June 28, 1918, at which all parties were represented, and at which an elaborate argument—we have been provided with the shorthand notes of what took place—was presented to the inspector based upon the figures which were contained in the letter of November 22, 1917, and the points upon which the borough relied, founded on those figures, were fully laid before the inspector. In the result the Local Government Board stated that, having considered the evidence given before the inspector, they were satisfied that the adjustment had become inequitable, and therefore decided to appoint an arbitrator.

The East Riding County Council applied to the Divisional Court for a prohibition. A prohibition will only be granted where a person is usurping a jurisdiction which is not legally

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vested in him. Mr. Disturnal's argument that the Minister of Health is usurping a jurisdiction by appointing an arbitrator is founded upon the suggestion that there were no materials before him upon which he could legally come to a conclusion that the original adjustment had become inequitable. The argument resolves itself into this: There can be no new adjustment because there is nothing to adjust, there being no financial relations between these county boroughs and the East Riding; and these county boroughs ought to be regarded as being in the same position as independent counties, between whom there can be no adjustment. With regard to the latter point, it is enough, I think, to say that, whether the position of these two county boroughs is, from many points of view, the same as that of independent counties, the Act expressly provides by s. 32, sub-s. 1, that, as between the East Riding and these two county boroughs, there has to be an adjustment in the first instance, and by sub-s. 6 that, when the circumstances justify it, there shall be a new adjustment. With regard to the question whether or not there is anything to adjust, that seems to me to be entirely a matter for the arbitrator in the exercise of his discretion to consider. It seems to me to be impossible to accept the contention that the Minister of Health has no jurisdiction to appoint an arbitrator when it is pointed out to him that the basis on which the original adjustment was made produced a certain result, and that, applying the same basis to the present conditions, an entirely different, and, from the point of view of Hull and York, an inequitable result is now being produced. It cannot be said that in those circumstances there is no evidence upon which he is entitled, as a matter of law, to come to the conclusion that the matter ought to be reconsidered.

For these reasons, in my opinion, the appeal fails.

SCRUTTON L.J. If I were the arbitrator laying down the basis of an equitable readjustment and the distribution of the proceeds of the local taxation licences and probate duty grant between these parties, I should want to know more

about the facts than I do at present. But that is not our position. We have only to decide whether the East Riding County Council is right in seeking to prohibit the Minister of Health, the successor of the Local Government Board, from appointing an arbitrator to consider that question at all. Sect. 32, sub-s. 1, of the Local Government Act, 1888, provided for an equitable adjustment, between each county and each county borough specified in the third schedule as being deemed for the purposes of the Act to be situate in that county, respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations if any. It contemplated that that adjustment might by lapse of time become inequitable; it therefore provides in sub-s. 6 that if, after five years from the date of the award adjusting the financial relations, the council of either the county or the borough satisfy the Local Government Board that the adjustment has become inequitable, the Board shall appoint an arbitrator. The Board in the present case states that it is satisfied that the adjustment has become inequitable. The East Riding County Council apply for a prohibition, and the only possible foundation for the application is that there is no ground on which the Board can be satisfied. The question is not whether we should be satisfied; the Minister of Health, the successor of the Local Government Board, is the person to be satisfied, and if there is any possible ground upon which he could come to the conclusion that he is satisfied, the question is one for him and not for us.

I have done my best to follow the able argument of Mr. Disturnal in a rather complicated matter, and the case seems to me to stand thus. Before 1888 the Exchequer made certain grants in aid to counties and county boroughs in the Appropriation Act each year, which were originally divided amongst the recipients in a way having, at any rate in some cases, some relation to the amount of work done in the area of the authority receiving the grant. These grants in aid ceased under the Act of 1888, and in place thereof the Act specified certain funds which were to be distributed amongst

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the new county authorities. One was the proceeds of the local taxation licences, and by s. 20 the proceeds were to be paid to each county according to the amount certified to have been collected therein. Another source from which the funds came was that described in s. 21 as four-fifth parts of one-half of the proceeds of the probate duties, now the estate duty (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 19), to which was added, by s. 7 of the Customs and Inland Revenue Act, 1890 (53 Vict. c. 8), part of the duties on spirits and beer ; and these funds were, by s. 22, to be distributed amongst the counties in proportion to the grants in aid received by each county during the financial year ending on March 31 next before the passing of the Act.

Now that made the sum distributed in any one year depend upon the amount received in a year which might be long preceding, which sum had been settled according to the amount of work then done, and it may well be that the proportion of work done had completely changed in a later year ; Parliament may have considered it necessary to provide means of varying the proportion of the amount. As between county and county apparently the Act provides no means of varying the proportion. Sect. 22, sub-s. 1, fixes the proportion of the probate duty grant distributable among the various counties " until Parliament otherwise determine." That does not however exhaust the matter. In establishing the new county government Parliament dealt with certain large boroughs and certain ancient boroughs which were situated in counties. By s. 31 it established county boroughs made up of two classes—namely, boroughs named in the third schedule, each of which on June 1, 1888, either had a population of not less than 50,000, or was a county in itself. Those two classes of boroughs, one of which down to that time had not separate government apart from the county in which it was situate, but had a population of not less than 50,000, and the other consisting of boroughs which from ancient times had been counties of themselves, separate from the counties in which geographically they were situate, were made county boroughs for the purposes of the Act. The schedule

provided in which county each of those county boroughs so created should be deemed to be situate, and thus it provided that those ancient boroughs, which had not before formed part of the county, should be deemed to be situate in the county in which each was geographically situate. The Act then proceeded to do what it had not done as between county and county—namely, to provide, by s. 32, for an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough, and for a means of making a new equitable adjustment.

It is contended that, though an equitable adjustment and readjustment of the distribution of the local taxation licences and probate duty grant could be made under the Act in the case of county boroughs which had not been counties in themselves before the Act, that could not be done in the case of boroughs which had been counties in themselves, because they were quite independent of the county and received separate grants. The answer is that Parliament might have dealt in this provision with the new county boroughs only, but it did not do so. It has used language which clearly applies both to the new county boroughs and to the ancient county boroughs. The equitable adjustment is to be made between each county and each county borough specified in the third schedule as being deemed for the purposes of this Act to be situate in the county therein mentioned. Those words exactly cover Hull and York; those boroughs were not in the county before, but are deemed for the purposes of this Act to be situate the one in the East Riding and the other in the North, East, and West Ridings. In my opinion the Act has expressly provided, in the case of these old boroughs which were counties in themselves, that the distribution of the proceeds of the local taxation licences and probate duty grant may be equitably adjusted between the county and the borough, and that that equitable adjustment may be revised on terms stated in the Act if the Local Government Board, now the Minister of Health, is satisfied that

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the adjustment has become inequitable. If Mr. Disturnal's contention is right, there ought not to have been any original award of adjustment between the East Riding and Hull and York. So far from that, the awards were made on the basis contended for by the East Riding in opposition to the contention then put forward by Hull and York. I agree that this ought not to affect the construction of the Act; local authorities may put forward a construction most favourable to their financial relations at the time; but if the view now contended for were the true construction of the Act, one would have expected that it would have been put forward at the time when in the case of this and other similar boroughs the financial relations with the counties were adjusted between 1890 and 1900.

I understand the Local Government Board have said that evidence has been put before them to show that the burden of work done which would have been a matter affecting the amount of the grant in aid in the year before the Act of 1888, has materially altered since the original adjustment was made, and that being so they were satisfied that the adjustment had become inequitable, and would appoint an arbitrator to make a new equitable adjustment. It is not for this Court to say whether it would have come to the same conclusion. It is enough if it is a legitimate matter, as I think it is, for the Local Government Board, now the Minister of Health, to consider, and if so they have power to appoint an arbitrator. It may be—I do not express any opinion upon it—that when the matter is before the arbitrator questions on the construction of the Act may be raised by special case. That is a matter with which we have nothing to do.

For these reasons I think that the appeal fails.

Atkin L.J. This case arises out of a dispute between the administrative county of the East Riding, the administrative county of the borough of Kingston-upon-Hull, and the administrative county of the city of York as to the shares they shall respectively receive from the contributions made

by the Exchequer in aid of the expenses of county government. Those contributions take two forms. First, there are the local taxation licences, the proceeds of which are, by s. 20 of the Local Government Act, 1888, to be distributed amongst the administrative counties in proportion to the amount collected in each county, and it is clear that "administrative county" in that section does not include a county borough. The other contribution is the probate duty grant, which consists now of a different duty, and has had added to it a certain share of an excise duty; but it is convenient to call it the probate duty grant. The share of the probate duty grant is, by s. 22, to be divided among the then existing administrative counties in proportion, not to the amounts collected in each area, but to the amount that each administrative county received of the old grants in aid from the Exchequer. Now, no doubt that bore some relation to the proper expenses of administration in each county, but the proportion was a fixed proportion, and the proportion is based upon the amount that each administrative county received in the financial year ending on March 31, 1888; and that being settled, the amount has been fixed from that date to this.

It is said by Mr. Disturnal that there is no room for any equitable adjustment in the case of these county boroughs, because the relation between these boroughs and the county before the Act was one of complete independence, Hull and York being counties of themselves. They had no financial relations of any kind with the East Riding, and, so far as the East Riding was concerned, they were in precisely the same position as though they had been situate in another geographical county, or had themselves formed another geographical county altogether; and the only case where there arises matter for adjustment is where, before the Act, there have been either joint assets or joint liabilities, and the assets have to be divided, and the liabilities have to be borne separately. In that case it is said there can be an adjustment, but if no such relations existed before the passing of the Act, then there is nothing to be adjusted, and each county has

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to receive, in accordance with the Act, that share from the Exchequer which the Act of Parliament says it is to receive.

Now, I think it cannot be disputed but that in the great majority of cases the Act, by s. 32, contemplated the existence of former relations, including the possibility of there being joint assets and joint liabilities, and some such adjustment as has been mentioned. The argument, I think, is a formidable argument which has to be met. It is endeavoured to meet it in this way. It is said that the section specifically deals with a county borough situate in a county by providing that an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the third schedule, shall be made by agreement, or by award; that all the essential elements required by the section are present—there is a county, the East Riding, and two county boroughs deemed for the purposes of the Act to be situate in the county; that there are the proceeds of the local taxation licences and probate duty grant, which have to be distributed; and that therefore an equitable adjustment according to the Act must be made. The argument is, as I have said, a formidable argument, and the answer is also a very formidable answer. It is pointed out that the burdens as between each county borough and the county in which it is situate may vary from time to time, and that it would be fair and just that the contributions of the Exchequer should vary according to the respective burdens. The answer that is made by Mr. Disturnal, and no doubt with some force, is that that is an answer which would equally apply to financial relations between independent counties; and, as far as they are concerned, there can be no question but that, however the burdens may vary as between them, the contributions remain the same; and inasmuch as there never was any common liability in this particular case, there is no reason for differentiating in the contribution that they may receive. I do not propose myself to give a final answer in respect of that question; I think it is a difficult question.

In this particular case that which purported to be an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant was in fact made in accordance with the provisions of the Act in the year 1891. Sect. 32, sub-s. 6, enacts: "Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the Board shall appoint an arbitrator." It seems to me that there are in this case all the conditions necessary to the appointment of an arbitrator. There has been an adjustment; five years have elapsed; and the Local Government Board (now the Minister of Health) are satisfied that that adjustment has become inequitable. If that is so, it seems to me that it is impossible to say that the Minister of Health has no jurisdiction to appoint an arbitrator. The applicants appear to me to be in a dilemma. If the adjustment was made on any valid ground, the Minister of Health is entitled to say that he is satisfied that that adjustment was made upon grounds which have now ceased to exist, or have altered, and have become inequitable. If the adjustment was not made on any valid ground it appears to me that in the same way the Minister of Health is entitled to say that there has been an adjustment between the parties which was not properly made; that circumstances were taken into consideration which ought not to have been taken into consideration at all, and there ought to be an arbitration to determine what the true rights of the parties are. I see no reason why the arbitrator is bound to accept the former basis, or the principle upon which the former award was made. I am far from saying that he need depart from it; he probably will have to consider the contention raised by the applicants that there is no room here for an adjustment at all, but that the parties must be left to their strict legal rights. But in this particular case I am satisfied that there is no ground for saying that the Minister of Health has exceeded his

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jurisdiction. All the facts exist in this case which give him jurisdiction under sub-s. 6 of s. 32, and therefore it appears to me that this application must fail, and the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for East Riding County Council: *Bockett, Stunt & Bockett, for J. R. Procter, Beverley.*

Solicitors for Minister of Health: *Sharpe, Pritchard & Co.*

Solicitors for Corporation of Hull: *Sharpe, Pritchard & Co., for H. A. Learoyd, Hull.*

Solicitors for Corporation of York: *Sharpe, Pritchard & Co., for P. J. Spalding, York.*

W. F. B.

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[IN THE COURT OF APPEAL.]

THOMAS, APPELLANT *v.* JONES, RESPONDENT.

Bastardy—Corroboration—Evidence of—Cumulative Effect of Facts which singly are not Evidence of Corroboration—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

The appellant was charged on complaint preferred by the respondent with being the father of a bastard child of the respondent. The appellant was a farmer and a bachelor. The respondent was his housekeeper. On the morning of the birth, when the respondent was in labour, the appellant, who had no other female servant, lit a fire for her and took her some tea and brandy. He also sent for the doctor. After the birth he allowed her and the child to remain for five weeks and two days (until June 17) in his house. There was no evidence whether she was sufficiently recovered to have left at an earlier date. The appellant admitted that during those five weeks and two days he never asked the respondent who was the father of her child. The respondent in her evidence said that during that time (though she did not fix the date except that it was before June 16) she asked the appellant what he was going to do about the child, and he said that there was nothing for him to do but to pay. After the respondent had left his house she wrote him a letter charging him with being the father of the child, and asking if he meant to pay for its maintenance. To that letter he made no reply:—

Held, by Bankes and Atkin L.JJ. (Scrutton L.J. dissenting), that the above facts did not afford any evidence corroborating the evidence

of the respondent in some material particular, as required by s. 4 of the Bastardy Laws Amendment Act, 1872.

By Scrutton L.J.: The fact that the appellant allowed the respondent to remain in his house for five weeks and two days after the birth of the child was, in the circumstances, some evidence of corroboration.

Decision of the Divisional Court [1920] 2 K. B. 399 reversed.

APPEAL from the judgment of a Divisional Court upon a case stated by justices of the county of Radnor. (1)

A complaint was preferred by Miriam Jones the respondent against the appellant David Thomas alleging that he was the father of a bastard child of which she was delivered on May 11, 1919. The justices adjudged the appellant to be the putative father of the child, but stated the following case for the opinion of the Court :—

" 5. The following facts were proved by the evidence of the respondent :—

" (*a*) The respondent was a single woman aged twenty-five. (*b*) She was delivered of a female child on May 11, 1919," at Llwynbeadd Farm. "(*c*) The appellant lives at Llwynbeadd Farm, Nantmel, in the county of Radnor, and is a bachelor aged 43 years. (*d*) The respondent went to work for the appellant as his servant and housekeeper in May, 1917, and was there until June 17, 1919, and during that time men, other than the appellant, lived and slept in the house. (*e*) The appellant had connection with the respondent the first time some time before the respondent had been at Llwynbeadd twelve months, but the respondent could not say when. Afterwards the appellant also had connection with the respondent, but the respondent could not say how often. (*f*) About July or August, 1918, the respondent went to a doctor, and he told her something about herself, and when she returned to Llywnbeadd she told the appellant that the doctor had told her she was in the family way. The respondent denied to everybody else, on being asked, that she was in the family way, because she did not want to tell her business to other people. (*g*) On the morning of May 11, 1919, when her child was born, the respondent was not well

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and was ill and moaning, and did not remember everything that happened. Early that morning the appellant made a fire and gave the respondent some brandy and tea in the kitchen. A doctor was sent for, and a Miss Evans came to the house. (*h*) The respondent remained in the appellant's house with the child until June 17, 1919. (*j*) On May 12, 1919, her time of service with the appellant at Llwynbeadd was finishing, and when the child was born on the previous day she had packed her box. (*k*) The appellant on being asked by the respondent what he was going to do about the child said: 'There is nothing for me to do but to pay you a lump of money.' Later (June 16, 1919) the appellant asked the respondent to take the child to be brought up by a Miss Mills, and that he would pay the money on the quiet. (*l*) After the respondent left the appellant's house she wrote him a letter on June 21, 1919, and another letter on July 14, 1919, and another on August 16, 1919. The letter of July 14 was as follows: 'Mon. 14. Llangors, Pantydwr, Rhayader. Mr. Thomas. Dear Sir, I just take the priviledge of writing these few lines to you hoping that you are well as it leaves me at present. I should like to know what you intend doing in regard to the child. Do you intend paying or not? If not I must see further about it for it is useless waiting, it is not as if you are paying for another man's child as you know the child is yours and no one else. I should be pleased to know by return of post one thing or the other. I conclude, Your's truly, Miriam Jones.' No reply to any of these letters was received by the respondent.

"6. The appellant was called by the respondent as a witness, and denied the paternity of the child, and all the allegations of the respondent connecting him with the paternity, and that he had ever had connection with her; and he stated that he did not know she was in the family way until the child was born, and that Miss Evans sent for the doctor; he did not.

"From the evidence of the appellant it was proved:—

"(*a*) That he knew the respondent went to a doctor in August, 1918, because he saw some medicine in the kitchen, and asked if she was not well, and she told him the doctor

had made some impudent remarks about her. He did not ask her what they were. (*b*) That he made a fire in the kitchen and there gave her brandy on the morning the child was born. (*c*) That he did not ask the respondent who was the father of the child during the time she was in his house after her confinement; and that he had received only one letter from the respondent, which was in July, 1919, and is the letter set out in paragraph 5 hereof, and did not reply to it because he thought it was blackmail. (*d*) That when she had the child he told her she must go.

"7. The respondent called John Price . . . . a farm servant, who proved the following facts:—

"(*a*) That he lived at the appellant's house while the respondent was housekeeper there. (*b*) On the day that the respondent was confined the appellant asked him to go to see Dr. Gordon Richardson.

"8. No evidence other than that of the respondent, the appellant, and the said John Price was called on behalf of the respondent, and at the close of the respondent's case the solicitor for the appellant submitted that the evidence of the respondent had not been corroborated in some material particular in accordance with the provisions of the Bastardy Laws Amendment Act, 1872, and he contended that the complaint ought to be dismissed and quoted *Burbury* v. *Jackson* (1) and *Wiedemann* v. *Walpole*. (2) The solicitor for the respondent contended that the evidence of the appellant and John Price was sufficient corroboration. On behalf of the appellant it was proved that the respondent had denied she was in the family way.

"9. We the said magistrates were of opinion that the evidence of the respondent had been corroborated by the facts that the appellant sent the witness John Price for the doctor on the morning of the birth of the child, that he allowed the respondent and the child to remain in his house from the birth of the child until June 17, 1919, and did not during that time ask the respondent who was the father of her child, and did not answer the letter of July, 1919, which he stated he

(1) [1917] 1 K. B. 16. (2) [1891] 2 Q. B. 534.

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had received, and by the demeanour of the witnesses and the way the evidence was given by the respondent.

"10. The question upon which the opinion of the said Court is desired is whether we, the said justices . . . . upon the above statement of facts came to a correct determination and decision in point of law, and if not what should be done in the premises."

In the Divisional Court, the Lord Chief Justice and Roche J. held that the facts relied upon by the justices (except "the demeanour of the witnesses and the way the evidence was given by the respondent," as to which they expressed no opinion), when looked at together amounted to evidence of corroboration, and they dismissed the appeal. Avory J. dissented, holding that there was no evidence of corroboration.

The appellant appealed.

Artemus Jones K.C. and *Roome* for the appellant. None of the facts relied upon by the justices afford any evidence corroborating the evidence of the mother in a material particular within the meaning of s. 4 of the Bastardy Laws Amendment Act, 1872. The fact that the appellant sent for a doctor is not evidence of corroboration. It was only the act of a humane man. Nor can the demeanour of the witnesses and the way the respondent gave her evidence be corroborative evidence. *Dawson* v. *M'Kenzie* (1) and *M'Whirter* v. *Lynch* (2) do not support the respondent's contention upon this point. The observations of the judges in those cases were founded upon *Macpherson* v. *Largue* (3), which shows how they ought to be read. There remain the facts: (*a*) that the appellant allowed the respondent and the child to remain in his house for five weeks and did not during that time ask her who the father was; and (*b*) that the appellant did not answer the letter of July 14 from the respondent stating that the child was his child, and asking him what he was going to do in regard to it. As to (*a*), the justices apparently did not accept the respondent's evidence that she charged the appellant

(1) 1908 S. C. 648. (2) 1909 S. C. 112.
(3) (1896) 23 R. 785.

with being the father, and therefore his act of kindness in allowing her to remain until she was well is not evidence of corroboration. There may have been no place to which she could go, even if she was well enough to be moved. At any rate the justices do not state when the charge was made; it may have been the day before or the very day on which she left the house. That he did not inquire who was the father cannot be treated as corroborating the girl's evidence. As to (*b*), *Wiedemann* v. *Walpole* (1) is in point. As Lord Esher M.R. said (2) the ordinary and wise practice is for a person not to answer a letter making a charge against him. No doubt in a commercial correspondence not answering a material statement may amount to an admission of its truth. (3) The statement of Bowen L.J. (4) that "silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not," does not support the respondent's contention. The circumstances in *Bessela* v. *Stern* (5) were quite different from those in the present case, and that case is no authority in support of the judgment below. Corroborative evidence in some material particular "must have some relation to the conduct of the person charged, that is, the putative father, or have some relation to the probability of his being the father": per Lord Alverstone C.J. in *Reffell* v. *Morton*. (6) As Lord Reading C.J. said in another connection, in delivering the judgment of the Court of Criminal Appeal in *Rex* v. *Baskerville* (7): "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime." Evidence which is consistent with either view is not corroborative evidence. Evidence of mere opportunity is not corroborative evidence: *Burbury* v. *Jackson*. (8) On the facts as found by the justices it would be dangerous to hold that there was evidence.

(1) [1891] 2 Q. B. 534.
(2) Ibid. 538.
(3) Ibid. 537, 538.
(4) Ibid. 539.
(5) (1877) 2 C. P. D. 265.
(6) (1906) 70 J. P. 347, 351.
(7) [1916] 2 K. B. 658, 667.
(8) [1917] 1 K. B. 16.

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corroborating the respondent's evidence in a material particular. The combination of two or more pieces of non-corroborative evidence cannot have the effect of corroborative evidence. It would be very dangerous to hold that it can have that effect.

[*Mash* v. *Darley* (1) was also referred to.]

H. C. Davenport for the respondent. The justices found that the appellant sent for the doctor when the respondent became ill. The appellant denied that he did so, and in the circumstances this is some evidence of corroboration: *Dawson* v. *M'Kenzie* (2), where Lord M'Laren said: "There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, i.e., his denial of circumstances which are otherwise proved, is to show that there is something of which he is ashamed, or something the admission of which he conceived would throw suspicion upon himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties." This passage was approved by Lord Dunedin in *M'Whirter* v. *Lynch*. (3) Next, allowing the respondent and the child to remain in his house for so long a time as five weeks is clear evidence of corroboration. The appellant might have explained this, but, as Roche J. pointed out in the Court below (4), no explanation was given to the justices such as the inability of the respondent to leave through ill-health. Nor did the appellant during those five weeks ever ask the respondent who the father was; and during that time the justices have found that the respondent charged him with being the father of the child. The justices might well come to the conclusion in those circumstances that he knew that he was the father, and it affords some corroboration of the respondent's evidence. Further, not answering the letter of July 14 is evidence of corroboration. As Kay L.J. said in *Wiedemann* v. *Walpole* (5): "The only fair way of stating the rule of law is that in every case you must look at

(1) [1914] 3 K. B. 1226.
(2) 1908 S. C. 650, 651.
(3) 1909 S. C. 113.
(4) [1920] 2 K. B. 410.
(5) [1891] 2 Q. B. 541.

all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission." A most damaging charge is made against the appellant in the letter, which he would be expected to deny if it were untrue. *Wiedemann* v. *Walpole* (1) was decided under s. 2 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), where the corroboration required in an action for breach of promise of marriage is stronger than in a case of bastardy: see per Lord Alverstone C.J. in *Reffell* v. *Morton*. (2) Under s. 4 of the Bastardy Laws Amendment Act, 1872, the requirement is merely that the evidence of the mother, not the fact of intercourse, must be corroborated in some material particular, whereas under the Act of 1869 the evidence of the plaintiff must "be corroborated by some other material evidence in support of such promise." *Cole* v. *Manning* (3) shows what "in some material particular" covers. So also in *Burbury* v. *Jackson* (4) it was held that evidence of mere opportunity is not evidence in corroboration. In the present case the evidence goes far beyond that.

Artemus Jones K.C. in reply.

BANKES L.J. This is a case which, to my mind, presents considerable difficulty, but after giving it the most careful consideration I can, I am of opinion that the view taken by Avory J. in the Court below is correct.

The question before us arises upon a case stated by justices on an application by the respondent under s. 4 of the Bastardy Laws Amendment Act, 1872, for an order against the appellant adjudging him to be the father of her child. That section provides that the justices "shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the

(1) [1891] 2 Q. B. 534.
(2) 70 J. P. 351.
(3) (1877) 2 Q. B. D. 611.
(4) [1917] 1 K. B. 16.

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man to be the putative father of such bastard child." Therefore it is essential, before justices can make an order under this section, that the evidence of the mother shall be "corroborated in some material particular by other evidence to the satisfaction of the justices." The question raised by the case is whether there was before the justices evidence which they were entitled to take into consideration as corroborating the respondent's evidence in some material particular. A similar question came before this Court in *Mash* v. *Darley*. (1) Kennedy L.J., in stating what the duty of the Court is upon such a case as this, said (2): "What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it," that is to say, the evidence which was tendered before them in that case in corroboration of the woman's evidence.

The question here is whether, upon the case as stated, the justices must be held to be wrong, because they acted upon the evidence alleged to be in corroboration. The form in which the case is stated does not make it perfectly clear what evidence the justices accepted as true, as distinguished from evidence upon which they intended to express no opinion. The case states in para. 5 that "the following facts were proved by the evidence of the respondent." In para. 6 it states that the appellant was called by the respondent as a witness, and that he made certain statements, with regard to which the justices do not say whether they were proved or not, but they go on to say: "From the evidence of the appellant it was proved that," and then certain facts are set out. Some of the facts which they treat as proved by the appellant's evidence seem to me inconsistent with some of the facts which they treat as proved by the respondent; but it is not, in my opinion, necessary either to send the case back to the justices to have that matter cleared up, or to come to any definite decision as to what it was the justices meant to say in reference to those particular matters. The question which the justices submit to the Court for its decision is stated in para. 9: "We, the said magistrates, were of opinion

(1) [1914] 3 K. B. 1226. (2) Ibid. 1235.

that the evidence of the respondent had been corroborated by the fact that the appellant sent the witness John Price for the doctor on the morning of the birth of the child." That is the first matter. Secondly, "That he allowed the respondent and the child to remain in his house from the birth of the child until June 17, 1919," that is to say, for five weeks and two days. Thirdly, "That he did not during that time ask the respondent who was the father of her child." Fourthly, "That he did not answer the letter of July, 1919, which he stated he had received." Fifthly, "By the demeanour of the witnesses and the way the evidence was given by the respondent." Those facts must necessarily be considered in relation to the story told by the respondent and the appellant. The respondent was a single woman who was housekeeper to the appellant, a bachelor aged 43 years, she herself being 25, at a farm which the appellant occupied in Radnorshire; she entered his service in May, 1917, and the child was born on May 11, 1919. It appeared that there was no other woman living in the house, but that there were other men servants who from time to time lived and slept in the house. The respondent had been to see a doctor in the autumn of 1918. She had then, according to her account, learned that she was in the family way. It appeared that on the morning of the day when the child was born she was taken ill, and the appellant attended to her to this extent, that he gave her some tea and brandy, and later he told his servant to go and fetch the doctor. It was a matter in dispute which the justices have not determined as to whether the doctor was sent for on the initiative of the appellant, or whether, as the appellant contended, the doctor was sent for on the initiative of Miss Evans who was called in, and he merely passed on Miss Evans's request that a doctor should be sent for to his man servant. Those are the main outlines of the case.

The respondent was called, and she told her story at length. The appellant was called as her witness. The only other additional witness who was called was the farm servant, who deposed to the fact that he received the instruction to fetch the doctor from the appellant himself. At the close

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of the respondent's case the appellant's solicitor contended that there was no evidence corroborating the respondent's story in some material particular. It was at that stage that the above matters were selected as those which the justices might lawfully take into consideration as evidence in corroboration of the respondent's story.

In *Rex* v. *Baskerville* (1) the question as to what constituted corroborative evidence was considered by the full Court of Criminal Appeal consisting of Lord Reading C.J., Scrutton, Avory, Rowlatt and Atkin JJ. The Lord Chief Justice, in delivering the judgment of the Court, stated what in their view amounted to corroboration. It is true that the language was used in reference to the corroboration at common law of the evidence of an accomplice, but I think the language applies equally to a case under the Bastardy Laws Amendment Act, 1872. The Lord Chief Justice said (2): "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused,' compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration

(1) [1916] 2 K. B. 658. (2) Ibid. 667.

need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

I think, with the necessary alterations to fit that language to this particular statute, it is entirely applicable to a case like the present, and I would only add my emphatic agreement with what the Lord Chief Justice said, that it would be in high degree dangerous to attempt to formulate the kind of evidence which should be regarded as corroboration, or to attempt any general definition of what constitutes corroborative evidence. But I think that assistance in this case can be derived by considering what is not and cannot be properly regarded as corroborative evidence. First of all, statements which are equally consistent with the story of the appellant as with the story of the respondent cannot properly be accepted as corroborative evidence. It is equally clear that evidence which obviously falls short of corroboration in a material particular cannot be accepted as corroborative evidence. Under this latter head I would put *Burbury* v. *Jackson* (1) where the Court had to consider whether evidence of mere opportunity for connection was of itself corroborative evidence in support of the mother's evidence under the Bastardy Laws Amendment Act, 1872. The Court held it was not, and Ridley J. used this language: "Opportunity raises no presumption here"; and I think that case might properly be classed as one where the evidence obviously fell short of corroboration in a material particular of the woman's story.

The view taken in the Court below by the Lord Chief Justice is this (2): "In this case I come to the conclusion that there is, in law, evidence upon which the justices could decide that the respondent's testimony was corroborated in some material particular by other evidence. Each fact found by the justices as tending to corroborate the respondent's evidence may by itself be insufficient as corroboration; but the cumulative effect of the evidence, regarded not separately but collectively, may be, and I think in this case is, sufficient.

(1) [1917] 1 K. B. 16. (2) [1920] 2 K. B. 406.

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I am not unmindful of the argument that this evidence is equally consistent with action dictated by kind and humane considerations; but I think the circumstances proved, taken in conjunction with the omission to answer the letter, are sufficient to justify the magistrates' decision. The question is one rather of the right inference of fact than one of law." That clearly indicates the Lord Chief Justice's view. He had referred to *Rex* v. *Baskerville* (1), and quoted part of the passage to which I have already referred. It seems to me to be clear that he did not misdirect himself; he was directing his attention to the question as to what was the right inference of fact to be drawn from the facts which the justices set out in the case as being those on which they relied. Mr. Artemus Jones complains that the Lord Chief Justice treated the cumulative effect of the evidence as something which he was entitled to consider, and he says that the notion that justices may add together a number of immaterial circumstances, and in the result arrive at the conclusion that those circumstances may together amount to sufficient corroboration, is very dangerous. The Lord Chief Justice does not suggest that that is permissible. What I understand him to refer to is this, that a single fact taken by itself may be colourless, but that fact when looked at in connection with other facts in the case may be highly significant; and he says that, taking each one of the above facts by itself, he might have come to the conclusion that it was colourless, yet taking all these facts together, one in relation to the other, in his opinion they bear the significance which each would not do if it were a single isolated fact apart from the others. Roche J. said (2): "In the present case the corroborative evidence, which may be circumstantial, must be such as tends to show that the appellant was the father of the child in question." Then he deals separately with each of the five facts to which I have referred, and comes to this conclusion (3): "Accordingly I hold the justices were justified in finding that there was corroborative evidence upon which

(1) [1916] 2 K. B. 667. (2) [1920] 2 K. B. 410.
(3) Ibid. 411.

they might act." He draws the inference that some, if not all, of these facts were not equally consistent with the two stories; that they were inconsistent with the appellant's story and consistent only with the respondent's story. Avory J., on the other hand, came to this conclusion (1): "In my opinion this case is of a class in which it is peculiarly necessary that the requirements of the statute as to corroboration should be strictly complied with, and in my view there was no evidence, apart from that of the respondent herself, which was not consistent with the innocence of the appellant, or which tended to prove that he was the father of the child."

As I have said, the inference I draw from the facts as stated by the justices is that drawn by Avory J., that there is no evidence, apart from that of the respondent herself, which is not consistent with the innocence of the appellant. I will deal with the facts seriatim, and ask myself whether any one of these facts has a different complexion put upon it, if I may use that expression, by any one of the other facts. The first fact is that the appellant sent for the doctor. I say, with great respect to any one who takes a different view, that it seems to me grotesque to suggest that the fact that the appellant, a bachelor with a single woman only in the house on the farm, sent for the doctor when the woman was apparently in great pain and seriously ill, is in any way inconsistent with his story that he was never intimate with her, and is more consistent with her story that he was the father of her child. I quite fail to grasp that, and it is a fact to which none of the other facts in the case appear to me to give any complexion or colour. The next is this, that he allowed the respondent and the child to remain in his house from the birth of the child till June 17, 1919. That is the only fact which has caused me any real trouble. It is the fact undoubtedly that the appellant, who was asserting that he was not the father of the respondent's child, but merely the master of a woman who had had a bastard child in his house, allowed her to remain in the house without apparently

(1) [1920] 2 K. B. 409.

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any attempt to turn her away for five weeks and two days. Is there anything in the statement of the case by the justices to add colour to that fact or does it remain an uncoloured fact ? There is one statement which might, I think, have afforded considerable colouring if it had been more explicit, and that is the statement in the case by the justices that the respondent had charged the appellant with being the father of the child, and that she had done that after the birth of the child and before she left the house. She left on June 17, and if that statement had been made the day the child was born, or within a short time after, and he had allowed her who made such a charge against him—according to him a false charge—to remain in his house longer than was absolutely necessary from the point of view of humanity, it might be said that there was material before the justices which they were entitled to take into consideration as matter of corroboration. But they left that statement with regard to the charge made by the respondent, as it seems to me, wholly colourless, because they do not state in the case the date when it was made, except that it was made before June 16. What the justices say is that the appellant, on being asked by the respondent what he was going to do about the child, said : " There is nothing for me to do but to pay you a lump of money " ; and the only statement with regard to the date at which that occurred is that it was before June 16. With the matter left in that uncertain position, can one say that the fact that the respondent remained in the house for five weeks and two days is of itself corroboration of her story in a material particular, when all one knows as being supposed to give colour to that fact is that at some time before June 16, the day before she left the house, she asked the man what provision he was going to make for the child ? In my opinion, that remains a colourless fact ; it is a fact which is equally consistent with either story, and ought not therefore to have been accepted by the justices as corroborative evidence.

The next is that he did not during that time ask the respondent who was the father of the child. It seems to me almost unnatural that he should ask. Is it a natural question to

ask of a woman, if the man, being a bachelor, is not the father of the illegitimate child which his servant has had in his house ? I cannot follow why he should ask the question.

The next is that the appellant did not answer the letter of July, 1919, which he admitted he received. There is authority for this proposition, that if the only fact relied upon is the mere fact that the letter was not answered, without any surrounding circumstances which would make it natural that it should be answered, that is not in itself corroborative evidence. I do not find any facts here which would render it natural that that letter should be answered.

The only other matter is, the demeanour of the witnesses and the way the evidence was given by the respondent. An attempt was made to bring that part of the case within the authority of the decisions in Scotland to which we have been referred, but in order to do that it is necessary to say that the appellant told a lie when he said that he had not sent for the doctor, and that he told that lie because he thought the statement that he had sent for the doctor might tell against him. When the facts are looked into, it does not appear that he told a lie about this. The manservant's evidence is quite consistent with the appellant's evidence that, although he gave the order to the man, it was Miss Evans who suggested calling in the doctor.

For these reasons I am unable to draw the same inferences as were drawn by the Lord Chief Justice and Roche J. in reference to these particular facts. The Lord Chief Justice thought that the question was one rather of the right inference of fact than one of law, but as the matter comes here to be dealt with as a question of law upon a case stated by justices, and was so dealt with in the Divisional Court, my opinion, which I have to express, is in accordance with the view taken by Avory J. and not with the view taken by the other members of the Court below.

For these reasons I think that the appeal succeeds.

SCRUTTON L.J. This is a case of considerable difficulty, made more difficult by the unsatisfactory way in which it

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comes before the Court. It is obviously a case of difficulty, for there was a difference of opinion in the Court below. There is unfortunately a difference of opinion in this Court, and the result is that three judges being of opinion that the justices were right and three that they were wrong, the decision of the justices will be reversed.

As I understand, there is no difference of opinion as to the law to be applied. Sect. 4 of the Bastardy Laws Amendment Act, 1872, requires the evidence of the mother to be corroborated in some material particular by other evidence to the satisfaction of the justices. The justices in this case were satisfied, and they ask in the case whether there was corroboration on which they could act. I take the law to be as stated by Buckley and Kennedy L.JJ. in *Mash* v. *Darley* (1), a decision which is binding on this Court. "It is not for us to say," said Buckley L.J. (2), "what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justices were entitled to take into account" certain facts. Kennedy L.J. said (3): "Whether, if I had had to deal with the case in the first instance, knowing the seriousness of the charge and the difficulty in many cases of disproving it, I should have thought this fact sufficient evidence of corroboration is another matter. All we have to consider is, might the justices acting judicially consider that conduct and act upon it? I will not differ from the conclusion to which my brethren have come. The statute says that it must be corroboration 'in some material particular,' and we must consider the particular in regard to the charge which is made, which is, here, one of paternity. As I say, I am not sure that I should myself have acted upon it. What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it."

(1) [1914] 3 K. B. 1226. (2) Ibid. 1231.
(3) Ibid. 1234.

The question therefore is not what opinion we should have come to if we had heard that evidence. That is quite immaterial. The question is, was there any evidence on which the justices could reasonably come to the conclusion that there was corroboration? If there was such evidence, they are the persons to say whether they are satisfied, and the fact that we should not have been satisfied is immaterial, because we are not the persons to be satisfied; it is the justices with their local knowledge who are to be satisfied.

That being the law, and I do not think there is any dispute as to it, the next question is, What is meant by "corroboration in some material particular"—that is, in a material fact? The vital fact to be proved in a bastardy case is that a child has been born to the applicant as the result of sexual connection with the man. From the nature of the case it is almost inevitable that there never will be any direct corroboration of sexual connection. The evidence in corroboration must always be circumstantial evidence of the main fact, that is to say, evidence from which it may be inferred that the main fact happened. For instance, the fact that the man has had connection with the woman and a child has resulted is sometimes inferred from evidence of previous affection, that they had been seen together showing affection to each other. Sometimes it is inferred from the fact of subsequent affection—that the man and woman are seen together showing signs of affection. Sometimes it is inferred from the fact that the man has done acts which may be treated as recognizing responsibility for the child as his child, statements that he will provide for the child, payments for the child, all facts from which as a matter of inference and probability it is more probable that the intercourse did take place than not. I quite agree with what Bankes L.J. has said, that if the fact is such that the probabilities are equal one way or the other, an inference cannot legitimately be drawn from it one way or the other. It must show, even only slightly, more probability that intercourse took place than not, and if there is that balance of probability it is not for the Court to say that it is so slight that it would not have acted upon it. If there is evidence

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on which the justices could have come to that view, it does not matter that the Court would have come to a different view. It is similar to the question as to when there is evidence for the jury; if there is evidence it is for the jury to decide, and not for the judge.

This case comes before us in an unsatisfactory character. The justices having heard the evidence have not submitted to the Court the notes of the evidence, but what they have done is to say this: "The question upon which the opinion of the said Court is desired is whether we, the said justices, upon the above statement of facts came to a correct determination and decision in point of law." I look back to see what the "above statement of facts" is. I find that the justices have said in para. 5: "The following facts were proved by the evidence of the respondent." When it is said that a fact is proved, it looks uncommonly like a statement of fact. When they come to para. 6, dealing with the evidence of the appellant, they cut it up into two paragraphs: one beginning, "The appellant was called by the respondent as a witness," and stated certain things; the other beginning, "From the evidence of the appellant it was proved." So that they apparently distinguish between certain statements he made which they do not accept, and certain statements he made which they do accept. Para. 7 states: "The respondent called John Price, a farm servant, who proved the following facts." Are those facts, which the justices say are proved, the above statement of facts on which we are to give an opinion? If they are not, we have to decide the question of corroboration without knowing what were the facts which the justices have accepted and acted upon. It is said that the justices cannot have meant to treat those facts as proved, because parts of the appellant's and respondent's evidence do not fit in very well. I have looked at them very carefully, and though I think it would have been better if the justices had been more exact, I cannot see that there is any clear inconsistency between the findings. One pair of findings which is suggested to be inconsistent is this: "About July or August, 1918, the respondent went to a doctor, and he told

her something about herself, and when she returned to " the farm " she told the appellant that the doctor had told her she was in the family way." That is in the statement in the respondent's evidence. The appellant's statement is that " he knew respondent went to a doctor in August, 1918, because he saw some medicine in the kitchen, and asked if she was not well, and she told him the doctor had made some impudent remarks about her. He did not ask her what they were." Looking at those two statements carefully, it seems to me that they can be perfectly well read together, and are not inconsistent. The respondent went to a doctor and the appellant knew it, for he saw some medicine in the kitchen. He asked if she was not well and she told him the doctor had made some impudent remarks about her. He did not ask her what they were. She told him that the doctor had told her she was in the family way. There is no contradiction whatever in those two paragraphs. The other findings alleged to be inconsistent are: " The appellant on being asked by the respondent what he was going to do about the child said: 'There is nothing for me to do but to pay you a lump of money.' Later (June 16, 1919) the appellant asked the respondent to take the child to be brought up by a Miss Mills, and that he would pay the money on the quiet." That is compared with the statement in the appellant's evidence that " he did not ask the respondent who was the father of the child during the time she was in his house after her confinement." I cannot see any inconsistency. The result is this: Feeling bound to read the language of this case in its ordinary meaning, it appears to me that when the justices have said that facts are proved and have asked our opinion on " the above statement of facts," they mean us to take the facts as proved, and I approach the case from that point of view.

A single woman living in the house of a bachelor has had an illegitimate child, and he has allowed her to remain in the house for five weeks and two days after the birth of the child, and while she was there he has said to her: " There is nothing for me to do but to pay you a lump of money," and

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asked her to make arrangements for the child. If those are the facts which I am to take, I find it impossible to say that the fact that he allowed her to remain in his house for over five weeks in those circumstances was not evidence which the justices could treat as corroboration of the respondent's story; and I rather gather, if that is the true view of the facts, one of my brothers at any rate might not have disagreed with me.

I desire also to deal with it on the other alternative. Supposing that, though the justices do not mean that the fact was proved, but merely that the respondent said so, and do not express any opinion whether she said so truly, the fact still remains that for over five weeks after the birth of the respondent's bastard child the appellant, a bachelor, allows the respondent, who has been in his service, to remain in his house. Whether or not I should have found that fact by itself to be sufficient, is not a question I have to decide. Can I say that justices, knowing the locality and local habits, were wrong in thinking that was a corroboration of the respondent's evidence? On the best consideration I can give to the matter, I cannot say that they were wrong in taking that as corroboration; I cannot say that it is no evidence on which reasonable persons might come to the conclusion that the man who allowed the woman to remain in his house under those circumstances was admitting some responsibility for the child who had been born in his house. That is a matter upon which I think that the Lord Chief Justice and Roche J. were right.

The other matters which were relied upon I do not think are sufficient corroboration. I do not attach any importance to the fact, if it be the fact, that the appellant sent for a doctor on the morning when the respondent was in pain. I do not know what else he could do. Whether or not he knew what was the matter with her, the fact of sending for a doctor does not seem to me to be an admission of responsibility for the respondent's condition. That he did not during that time ask the respondent who was the father of the child, I do not myself find sufficient. That he did not answer the letter of

July, 1919, which he stated he had received, I do not think sufficient. The question of not immediately repudiating an accusation is one of very considerable difficulty, and is, in my view, entirely a question of degree. If a charge of outrageous conduct is made against a person in public, and he says nothing, I have always thought that a jury would be entitled to treat his silence as an admission, if it was the class of accusation in respect of which, and the people in the neighbourhood were the class of people from whom, a repudiation of an untrue charge would be expected. But I do not think the same principle applies to accusations made by private letter. Lunatics write all sorts of letters to all manner of people, and if the receiver of a letter from a lunatic making a charge were bound to write at once and deny it, the time of judges, at any rate, would be fully taken up by answering the letters. I quite agree with what was said in *Wiedemann* v. *Walpole* (1), and what has been said in the present case, that the mere fact of receiving a statement by letter is not enough to justify justices or a jury in finding corroboration. Next comes, "By the demeanour of the witnesses." That is so vague that I really do not feel able to decide on it. If they had said: "By some particular circumstance in the demeanour of the appellant," then a serious question might have arisen. I personally, in my experience as a judge, have seen several cases of that sort. I have in mind a case where the demeanour of the person and his mode of denying the charge was convincing of his guilt. Here there is no definite allegation or anything I can check. "By the demeanour of the witnesses" is so vague that it is quite impossible to know what the justices were referring to when they put such a vague statement in the case. Lastly, "the way the evidence was given by the respondent." I agree that one cannot treat the way in which the respondent gave evidence as corroboration of her own evidence.

The case comes back to this: The question being, Was there evidence which the justices could reasonably treat as

(1) [1891] 2 Q. B. 534.

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corroboration? the case, in my view, states that the appellant allowed the respondent to remain in his house for over five weeks during which time she was charging him with being the father of the child. I think that is abundantly sufficient corroboration. If I am wrong in thinking that the case states that, and the right view is that it merely states that he allowed her to live in the house for over five weeks, I still think that is material which, whatever view I should take, the justices were entitled, knowing the circumstances and the locality, to treat as corroboration. It is on that ground that I agree with the result of the judgment of the Lord Chief Justice and Roche J., and I think that this appeal should be dismissed.

ATKIN L.J. I agree that this case presents difficulties, and the difficulties are not diminished by the way in which the case is stated; but I agree with my Lord that the appeal should be allowed, and in doing so it is a satisfaction to feel that all the members of this Court are agreed that, as to three at any rate out of the four pieces of evidence which were accepted by the majority of the Court below as corroborative evidence, their decision was erroneous. The only difference between us is upon one piece of evidence with which I shall deal later. The evidence of the mother of the child to be sufficient has to be "corroborated in some material particular by other evidence to the satisfaction of the said justices." That appears to me to be a very important safeguard, and it is of the greatest importance that it should not be whittled down, but should be maintained in full, as in my experience it is essential for the purpose of doing justice between the parties in this class of case, where charges are so easily brought and with such difficulty refuted, and where there is a strong temptation either to conceal the identity of the real father or to impose liability upon the person who is best able to bear it. What is meant by corroborative evidence is established now by the decision in *Rex* v. *Baskerville* (1), which I think must be treated as an authority generally upon the meaning of

(1) [1916] 2 K. B. 658.

corroborative evidence. It must be evidence which tends to prove that the man is the father of the complainant's child; in other words, it must be evidence implicating the man, evidence which makes it more probable than not that the respondent to the summons is the father of the child.

It is not necessary to recapitulate all the facts here. I propose to deal shortly with the facts which are relied upon for treating the conduct of the appellant both before and after the birth of the child as corroborating the evidence of the respondent in a material particular. The facts before the birth which are relied upon are that when the respondent was in labour, the appellant lighted a fire, gave her brandy and tea, and sent for the doctor. What else could an innocent person have done? There was nobody else either to light a fire, or to make the tea, or to give her brandy, and it appears to me, as I think it appears to my Lord, grotesque to suggest that in those circumstances any inference or admission of paternity is to be gathered from those facts. I think the same observation applies to sending for the doctor. Common humanity would suggest to a man in that position, a bachelor, with no other woman in the house except a neighbour just called in, that it was necessary to send for the doctor. The only other matter that is suggested in reference to sending for the doctor is that, whereas the act would be colourless and innocent in itself, the fact that the respondent in his evidence denied that he sent for the doctor throws upon it a taint of guilt. I do not gather that he did in fact make that denial, and on the case as stated it appears to me to be perfectly consistent with the real facts that Miss Evans, who was called in, was the person who thought it necessary that the doctor should be sent for, and that the appellant merely carried out her request and gave orders to his farm servant to go and fetch a doctor. Whether that be so or not, I do not myself think, from the mere fact that the appellant denied that he sent for the doctor, that an act which otherwise was an innocent one became an admission of guilt.

Another fact relied on was that the appellant did not ask the respondent who was the father of the child. Assume an

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innocent man who is not the father, the master of the house, and the girl laid up in his house having a child, is it or is it not reasonable that he should refrain from asking who the father was? Would he expect to get an answer if he did ask? I should have thought he would not, but in any case it seems to me that the fact that he did not ask who the father was does not make it more probable he was the father, and therefore does not appear to me to afford corroborative evidence.

The other fact, and an important fact, because upon this Scrutton L.J. differs, is that the appellant allowed the respondent and the child to remain in his house for five weeks after the birth of the child. Regarding that as a mere statement without anything more, what is the inference proposed to be drawn from it? It appears to me to be this, that if an unmarried woman gives birth to a child in a house, and the owner of the house allows her to remain in the house for five weeks after the birth, that affords evidence that the owner of the house is the father of the unmarried woman's child. That is a proposition which certainly I myself am not prepared to accept. And there is no evidence, which I think the respondent ought to have adduced if that fact was to be of any value, that she was able to leave the house in a shorter period than five weeks, and, which is most important, that the appellant knew that she was able to leave the house in a shorter period than five weeks and that there was a place to which she could go. It is perfectly consistent with the facts as found in the case that either the respondent had a bad confinement—and it is well known that a woman may be incapacitated for five weeks, especially when no preparation has been made in regard to her motherhood—or that she did not let the owner of the house know that she was able in a shorter period to make the necessary arrangements for leaving the house and supporting herself and her child. It appears to me to be impossible to lay down that there is a certain period the lapse of which at once affords evidence upon which it can be found that permission to dwell in the house beyond that period is an admission of guilt. It is said that the justices have found that the appellant had in fact been charged

by the respondent with the paternity of the child, and that therefore to allow her in those circumstances to remain for five weeks was in itself evidence of an admission of guilt. I cannot take the view that the justices have so found. I cannot read these inconsistent statements as being anything other than statements made on oath by the witnesses. If the justices have found anything as a fact it is what they have found in para. 9, where they say : " We were of opinion that the evidence of the respondent had been corroborated by the fact that " (inter alia) " he allowed the respondent and the child to remain in his house from the birth of the child until June 17, 1919, and did not during that time ask the respondent who was the father of her child." It seems to me it is impossible that they could have relied upon this last fact as corroboration, and at the same time have intended to find that the respondent had already charged the appellant with being the father of her child. If they believed that she had done that, then obviously the fact upon which the justices rely that he did not make the inquiry becomes irrelevant. If, however, the justices did so find, I should have had very considerable doubt whether that finding was a proper element in considering whether or not this conduct of the respondent was corroboration ; because if the corroborative value of the independent evidence is non-existent, unless the evidence of the mother is believed, I am content to say that at present I have considerable doubt whether the corroboration is established. I venture to doubt whether it can be considered to be the right procedure that the justices are first of all to make up their minds as to whether the mother's evidence is true, and, if it is true, then to consider whether there is corroborative evidence so as to permit them to give effect to what they have already found—namely, the truth of the issue between the parties. I throw that out as a view. I do not wish to decide it at the present moment.

The other fact relied upon is this. It is said that the letter which the respondent wrote to the appellant was not answered, the letter alleging that he was the father of the child, and, if he did not make provision for it, she would have

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to take other proceedings. I think it is sufficient in answer to say, according to *Wiedemann* v. *Walpole* (1), that the non-answering of a letter in the circumstances of this case is not in law evidence of an admission of liability, and therefore is not corroborative evidence.

There was a suggestion in the Court below that, although each one of these facts in itself was insufficient, yet the accumulation of them might make them sufficient. If all that is meant by that is the explanation given by my Lord, one can accept it. It may be that light may be thrown upon something, which in itself is innocent and irrelevant, by some other circumstance which though not itself conclusive may yet be illuminating. But, apart from that, it appears to me impossible, when dealing with the question of corroboration, that the accumulation of pieces of evidence, each of which by itself is not admissible as corroborative evidence, can amount in the whole to corroboration. Ex nihilo nihil fit. That appears to me to be different from circumstantial evidence, where evidence of independent facts, each in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection one with the other as links in a chain, prove the principal fact to be established.

For these reasons I think that this appeal should be allowed, and I must say that I arrive at this conclusion with much greater satisfaction feeling that I am fortified by the great experience of Avory J., with whose judgment I agree.

Appeal allowed.

Solicitors for appellant: *T. D. Jones & Co., for E. P. & A. L. Careless, Llandrindod.*

Solicitors for respondent: *Churchill, Smallman & Co., for R. E. George, Newtown.*

(1) [1891] 2 Q. B. 534.

W. F. B.

Distinguished. HUTCHINSON v. JAUNCEY. [1950] 1 All E.R. 165.
Applied. HUTCHINSON v. JAUNCEY [1950] 1 K. B. 574
Distinguished. JOHN M. BROWN LD. v. BESTWICK [1951] 1 K. B. 21

[IN THE COURT OF APPEAL.]

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July 19, 20, 30.

REMON *v.* CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

[1920. R. 1165.]

Emergency Legislation—Landlord and Tenant—Notice to quit—Termination of Tenancy—Refusal of Tenant to give up Possession—Re-entry by Landlord—Statutory Tenancy—"Tenant"—Premises "let"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 5, 12, 15.

Two rooms to which the provisions of the Increase of Rent Act, 1920, applied were let to the plaintiff on a quarterly tenancy to be surrendered four clear days before the quarter day for which any notice to quit might be given. The plaintiff received notice to quit "on June 24 next or at the expiration of the year of your tenancy which shall expire next after the end of a half year from the delivery of this notice." The plaintiff did not yield up the premises but remained in possession against the will of the landlords until the passing of the Act of 1920. Then the landlords entered the premises and retook possession :—

Held, that although the agreement of tenancy had come to an end by the notice to quit, the rooms were "let" within the meaning of s. 12, sub-s. 2, and the plaintiff was a tenant who by virtue of the provisions of the Act retained possession within the meaning of s. 15, sub-s. 1, of the Act, and that the landlords could not lawfully disturb him in his possession.

Decision of the judge in chambers affirmed, varying the terms of the injunction.

APPEAL from an order of McCardie J. in chambers.

The following statement of facts is taken from the written judgment of Bankes L.J. :—

By an agreement in writing dated December 15, 1915, the City of London Real Property Co., Ld., the defendants, let to Remon, the plaintiff, two rooms in the basement of No. 10 Union Court in the City of London on a quarterly tenancy upon the terms that possession of the premises should be surrendered at least four clear days before the quarter day for which any notice to quit might have been given. The rooms were used for business purposes.

On February 25, 1920, the defendants gave the plaintiff notice to quit "on June 24 next or at the expiration of the

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year of your tenancy which shall expire next after the end of half a year from the delivery of this notice."

In March the defendants let the premises to another tenant. Early in June they called the plaintiff's attention to the provision in the agreement with reference to giving up possession, telling him that they had arranged for their builders to commence the necessary work of redecoration for the new tenant on the 20th. The plaintiff did not give up possession, as he ought to have done, either on the 20th or on the 24th. On the 26th the defendants' solicitors wrote to the plaintiff requiring immediate possession. The plaintiff did not comply with the demand. On July 2, the plaintiff who still retained possession of the premises went home for the night and locked them up. In his absence the defendants caused the locks to be broken and took possession. On that day the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), came into force. The premises so far as their description and value were concerned fell within the provisions of that Act. On July 8 the plaintiff commenced the present action claiming an injunction and damages on the ground that he was entitled to the benefit of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1) On the plaintiff's application McCardie J. granted an injunction restraining the defendants and their servants

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" in the circumstances therein specified.

Sect. 12, sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" the amounts therein mentioned.

Sect. 15, sub-s. 1: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice. . . . ."

or agents from entering upon the premises or interfering with the plaintiff in his occupation thereof until the trial of the action or further order. The summons was treated as the hearingof the action without prejudice to an appeal.

The defendants appealed.

Romer K.C. and *Foà* for the appellants. The respondent is not entitled to the benefit of the Act of 1920. No order or judgment is being sued for, and therefore s. 5 has no application. The premises are not let, because the tenancy determined on June 20 or 24. If they are not let, s. 12, sub-s. 2, has no application. Without that sub-section the premises would not be within the Act at all. It follows that they are not premises to which this Act applies within the meaning of s. 15, sub-s. 1, the enactment on which the respondent relies to support the injunction. In order that the Act may apply there must be a letting of a house or part of a house within s. 12, sub-s. 2, and a person claiming the benefit of the Act must be "a tenant" who by virtue of the Act retains possession within s. 15, sub-s. 1. Here the letting had determined by notice to quit; the respondent was not a tenant, because his tenancy had determined in law by the notice to quit, and in fact by the appellants' entry. He was not even a tenant at sufferance. That distinguishes this case from *Dobson* v. *Richards* (1) and *Hunt* v. *Bliss* (2), assuming those cases to have been rightly decided. Moreover, whatever may have been the effect of the earlier Acts, under which those cases were decided, the respondent was not a tenant "who by virtue of the provisions of this Act retains possession," because by virtue of the Act of 1920 he must "observe all the terms and conditions of the original contract of tenancy," one of which was to give up possession upon notice to quit.

Disturnal K.C. and *Wallington* for the respondent. The appellants could not have got an order or judgment for the recovery of these premises, because none of the events enumerated in s. 5, sub-s. 1, enabling him to do so had

(1) [1919] W. N. 166. (2) [1919] W. N. 331.

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happened, and because, notwithstanding the argument for the appellants, he was and is a tenant within the meaning of the Rent Restriction Acts. A tenant at sufferance is a tenant within the meaning of those Acts: *Artizans Dwellings Co.* v. *Whitaker.* (1) One who was a tenant under an agreement but who has received a notice to quit; who, notwithstanding that notice, pays or tenders the standard rent, has a statutory tenancy and is a "tenant" within the meaning of s. 5, sub-s. 1, and s. 15, sub-s. 1. To hold that he is not a tenant, because he only holds on the terms of the original contract of tenancy one of which is to give up possession on the expiration of a notice to quit, is to nullify not only the Act of 1920 but all the previous Acts, the object of which was to permit a tenant to remain in possession in spite of a notice to quit. But though no order or judgment for possession could be made or given, yet it is said the landlord may re-enter and take possession. That argument ought not to prevail. Though not expressed, the intention of the Legislature is to be inevitably inferred that he who was tenant should, except in certain specified events, remain undisturbed. He is "a tenant who by virtue of the provisions of this Act retains possession" within the meaning of s. 15.

Neither should the argument upon s. 12, sub-s. 2, weigh with the Court. It is said that these premises are not a house or part of a house "let" as a separate dwelling or, by s. 13, sub-s. 1, as separate business premises. This is really a repetition of the argument upon ss. 5 and 15. As long as premises are in the possession of "a tenant who by virtue of the provisions of this Act retains possession" they are "let" within the meaning of s. 12, sub-s. 2. Even if this were not so, the word "let" is not of the essence of the enactment; it is only a word of description identifying the premises. The value and description of the premises are the essence of the enactment.

If this be the true view, it follows that the re-entry by the appellants was an unlawful act and could not determine the

(1) [1919] 2 K. B. 301.

statutory tenancy of the respondent. They must restore the possession they have interrupted.

[*Crook* v. *Whitbread* (1) and *Howard* v. *Fanshawe* (2) were cited.]

Romer K.C. in reply. By the common law the appellants had a right to re-enter on June 20 or 24. The Act of 1920 does not mention the right of a landlord to re-enter on the termination of a tenancy. The inference is that the Legislature intended to leave that right unaffected: *Alexander* v. *Brame* (3); *Ramsden* v. *Lupton* (4); *In re Cuno.* (5) To rely on s. 15, sub-s. 1, is to beg the question. The question is whether one who was a tenant, and whose former landlord has now a right to re-enter, retains possession "by virtue of the provisions of this Act." He does not. The Act only provides that no judgment or order for the recovery of possession or for ejectment shall be made or given. The landlord's right to re-enter is left untouched.

As to s. 12, sub-s. 2, the relation of landlord and tenant must exist before the premises can be described as "let." The word might properly describe a house which the occupier holds over with the consent of the owner, or a house which at the passing of the Act of 1920 the occupier held by virtue of one of the former Rent Restriction Acts. But where at the passing of the Act there was no landlord and no tenant the premises in question cannot be said to be let.

[*Mackay* v. *McGuire* (6) was cited.]

Cur. adv. vult.

July 30. The following written judgments were delivered.

BANKES L.J. This appeal from McCardie J. at chambers raises the question whether the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which came into force on the 2nd of this present month, has any application to the respondent's case. [The Lord Justice stated the

(1) [1919] W. N. 185.
(2) [1895] 2 Ch. 581.
(3) (1855) 7 D. M. & G. 525, 539.
(4) (1873) L. R. 9 Q. B. 17, 28.
(5) (1889) 43 Ch. D. 12, 17.
(6) [1891] 1 Q. B. 250. Other authorities referred to were: Co. Litt. 57*b*; 2 Bl. Com. 150; Cole on Ejectment, 455; Halsbury, Laws of England, vol. xviii., p. 437.

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facts and proceeded :] It was contended for the respondent that this was not a good notice to quit on the ground that it was uncertain. In my opinion the alternative contained in the last clause of what was a printed form, obviously prepared for use in the case of a yearly tenancy, has no application in the case of a quarterly tenancy such as the respondent's, and may be treated as surplusage. I think that the notice to quit on June 24 was a good notice, and was accepted as such by the respondent, as he acknowledged that the rent for the quarter ending June 24 was payable in advance in accordance with his agreement which provided for payment in advance for the final quarter of the tenancy.

In no ordinary sense of the word was the respondent a tenant of the premises on July 2. His term had expired. His landlords had endeavoured to get him to go out. He was not even a tenant at sufferance. It is however clear that in all the Rent Restrictions Acts the expression "tenant" has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him. The respondent therefore on the coming into operation of the new Act was a tenant within the meaning of that expression in the Act, and as the Act for the first time included business premises within its protection, the premises were not excluded on the ground that they were business premises only.

Mr. Romer however contended that the respondent did not come within the protection of the Act for three reasons : 1. Because the only protection afforded by the Act is that contained in s. 5 which is confined to protection against orders or judgments for the recovery of possession, or for ejectment, in other words against process of law ; and that the Act had no application to a case where a landlord has resumed peaceable possession, as in the present case. 2. Because by s. 12, sub-s. 2, the Act only applies to houses which were "let" at the date the Act came into operation,

which the respondent's premises were not, the term having expired on June 24. 3. Because the respondent did not on July 2 within the meaning of s. 15 retain possession of the premises "by virtue of the provisions of this Act."

If each of these sections is to be treated separately there is much force in Mr. Romer's contentions as to the literal construction to be placed upon the language used in them. They cannot however be so treated. They form part of the statute, and they must not only be read together, but as forming part of an entire whole. However much the draftsmanship of the Act may be open to criticism, the Court must endeavour to place a reasonable interpretation upon the statute, if the language used admits of such an interpretation. To accept Mr. Romer's construction would be to rule out a large number of cases which the Legislature must have intended to include, as for instance all the cases of tenants in occupation by virtue of the previous Rent Restriction Acts, none of whom would be in occupation of houses "let" to them in the sense in which Mr. Romer asks the Court to construe that expression. It is, I think, possible to adopt a construction of s. 15 which gets rid of much of the difficulty suggested by Mr. Romer. Sect. 15 is intended to supply something that was wanting in the previous Acts, namely, an indication as to the legal position of a person who continued in occupation of premises merely by reason of the protection afforded by those Acts. The opening words of s. 15 are words of description of the person to whom the conditions of the statutory tenancy apply. He is described as a tenant who by virtue of the provisions of the Act retains possession of a dwelling-house to which the Act applies. As pointed out by Mr. Romer in his argument the Legislature in s. 5 was apparently only contemplating eviction by legal process. A person therefore who is protected by the Act from eviction by legal process from his dwelling-house may not inaccurately be described as a person who by virtue of the Act retains possession of his dwelling-house. The respondent being obviously a person protected by s. 5 from eviction by legal process, comes in

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my opinion within the description contained in s. 15, and is therefore entitled to the benefit of the Act, assuming that his premises come within the Act. I have already explained the meaning which must necessarily be given to the expression "tenant" as used in the Act. I consider that a similar construction must be placed upon the expression "let" in s. 12, sub-s. 2. The sub-section cannot be confined to premises in respect of which a letting is in existence at the time when the protection of the Act is claimed. The expression must be read as sufficiently elastic to include the letting under which the tenant who claims the protection of the Act became tenant.

For these reasons I consider that the appeal fails and must be dismissed with costs, though the form of the injunction will be confined to an injunction restraining the appellants from interfering with the respondent in his occupation of the premises.

SCRUTTON L.J. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, came into force on July 2 of that year. On that day one Remon was in fact in possession of two rooms in No. 10 Union Court. He had gone into possession under an agreement with the landlords on a quarterly tenancy commencing December 25, 1915, and had received a valid notice to quit the premises on June 24, 1920. The premises were not before July 2 the subject matter of any Rent Restriction Act. Mr. Remon had stayed on in possession after his tenancy had expired; he had been asked to leave by the landlords and had referred them to his solicitor; and some time on the night of July 2–3, the landlords had entered his premises in his absence and taken possession. The question is whether, his tenancy by agreement having expired at a time when no Rent Restriction Act gave him any right to stay on, and the landlords having got into the premises without any assistance from the Court, he can claim any right to stay on or to ask the Court to restrain the landlords from interfering with his possession.

The object of the various Rent Restrictions Acts is clear. It was intended to prevent the tenant from having his rent raised against him, or from being turned out, though his tenancy by agreement had expired, so long as he was willing to pay the rent authorized by statute. He was originally presented by Parliament with a statutory tenancy at the will of the tenant for so long as he liked and no longer. But Parliament did not in terms say that though his tenancy by agreement had expired, he had a statutory right to stay in on specified terms ; it provided that no order for recovery of possession should be made, and omitted expressly to provide what sort of a legal interest the person who stayed in by permission of Parliament and against the will of the landlord should have, nor did Parliament expressly provide for the case where the landlord by his own action and without obtaining the order of the Court, got into possession of his own premises.

The Act of 1920 has made some progress in the development of this new statutory tenancy. Under the original Acts the statutory tenant was allowed to stay if he "performed the other conditions of the tenancy." But one of those conditions might be to give up the premises at the expiration of the tenancy by agreement. To insist on this as a condition would be to render the whole Act nugatory, and Astbury J. in *Artizans Dwellings Co.* v. *Whitaker* (1) held that this part of the conditions of the tenancy was inapplicable. In the present Act the "tenant" is only to comply with the terms and conditions of the original tenancy "so far as the same are consistent with the provisions of this Act." Again, under the old Acts the "tenant" was at liberty to leave at a moment's notice. Under the present Act, he must give either the notice required by the original agreement, or if no notice was required, three months' notice. This still leaves him free to determine the statutory tenancy at his own will while the landlord can only determine through the Court on statutory conditions. But the statute in endeavouring

(1) [1919] 2 K. B. 301, 304.

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to define the new statutory tenancy uses the phrase "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies" and the framers of the Act were obviously under the impression that some provision of the Act did entitle a tenant to retain possession. They can only have been referring to the section which prevents any order for the recovery of possession being made. Whom did they mean to include in the term "tenant"? If a tenant by agreement whose tenancy had expired was not within those terms, the whole purpose of the Act would have been defeated, for it was obviously intended to allow former tenants who were willing to carry out the terms of their old tenancy, as modified by any permissible statutory increases of rent, to stay on. If this was not so every weekly or monthly tenant, the small tenant for whose benefit the Acts were obviously framed, was outside the Act. Unless "tenant" includes a former tenant by agreement holding over against the will of the landlord, and "letting" includes the landlord's relation to such a tenant, the whole object of the Acts is defeated. It is true that some of these persons would never previously have been called "tenants" by any lawyer. The nearest approach to them is "tenant by sufferance" who as Lord Coke says (1): "entreth by a lawfull lease and holdeth over by wrong," whose tenure was probably invented to prevent their obtaining a title by adverse possession as disseisors. But tenants by sufferance seem to have been confined to persons who held over without the assent or dissent of their landlords, and not to have included persons who held over wrongfully in spite of the active objection of their landlords. Yet I think it is clear Parliament has intended to confirm these people in a statutory tenancy and to speak of their position as a "letting." Mr. Romer argued very forcibly to us that though the policy were clear yet the Courts ought not to give effect to it unless they could find words apt in their ordinary meaning to justify them in so doing, and that the case of a landlord getting

(1) Co. Litt. 57*b*.

into possession of premises which under the agreement of tenancy he had a right to enter had not been dealt with by Parliament. I do not think it has expressly ; and I feel that I am straining language in speaking of a person whose tenancy has expired, and who stays in against the active protest of the landlord, as a "tenant," and of the landlord's relation to him as a "letting" ; but such a person appears to be within the clear intention of the Legislature, and where the statute has forbidden any process of Court to be used to eject him, I think it must have intended and be taken to forbid ejection by the private action of the landlord without the aid of the Court. A similar point as to a house not within the 1915 Act which came within the 1919 Act was decided in the same way by the Lord Chief Justice in *Dobson* v. *Richards* (1), and I think the decision was correct.

In my view this decision must be confined to cases where there was a previous legal "letting" and legal tenancy, and does not extend to caretakers, occupants by service, and mere trespassers, and in case of such a previous legal "letting" and "tenancy," applies to the tenant, though his term has expired or been terminated by notice and he holds over even against the active objection of his landlord. The policy of the statute is a matter for Parliament and not for me, but those who ask for and pass such legislation should not be surprised if, as one of the effects, existing houses are not let but only offered for sale, and no fresh houses are built by private enterprise.

In my view the appeal should be dismissed, but the injunction should be limited by the term "so long as his statutory tenancy subsists by virtue of the Rent Restriction Act, 1920, or any modification thereof."

ATKIN L.J. concurred.

Appeal dismissed.

Solicitors for appellants : *Vincent & Vincent.*
Solicitors for respondent : *Cohn, Seligman & Bax.*

(1) [1919] W. N. 166.

W. H. G.

1920
Oct. 13.

HAMER *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Excess Profits Duty—Capital—Value of Patent—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 41, *Sch. IV., Part III., para.* 1 (*c*).

By the Finance (No. 2) Act, 1915, Sched. IV., Part III., para. 1 (*c*), the amount of the capital of a trade or business, for the purposes of excess profits duty, so far as it does not consist of money and so far as it consists of assets which have not been acquired by purchase, shall be taken to be "the value of the assets at the time when they became assets of the trade or business."

During the year in respect of which he was assessed to excess profits duty, the appellant, at a cost of 400*l.* took out a patent for use in his business. The patent proved a success during the year in question, and the appellant estimated its value at 6000*l.*, but this value was not actually arrived at until a later date. The Commissioners having found the value of the patent at the time when it became an asset of the appellant's business to be 400*l.* and no more, the appellant appealed and claimed that the value should be taken to be 6000*l.*:—

Held, that in arriving at the value of the patent at the material date it was not permissible to have regard to its subsequent success, and that the Commissioners' finding could not be disturbed.

CASE stated by Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners the appellant, Hamer, appealed against an assessment to excess profits duty for the accounting period April 6, 1917—April 5, 1918. There was no dispute as to the figures apart from the question whether any, and, if so, what capital value should be placed upon a certain patent. If any capital value was to be placed upon it, a deduction fell to be made under s. 41, sub-s. 1, of the Finance (No. 2) Act, 1915, from the profits of the accounting period at the statutory percentage per annum on the amount by which the capital had been increased during the accounting period. The patent in question was taken out by the appellant for use in his business on May 3, 1917, at an expense of 400*l.* The appellant traded at a loss until 1916; in the year ending April 5, 1917, he made a small profit; and in the year under review, by pushing his business and using the patent, he made a net profit of 1740*l.* He estimated the value of the patent at 6000*l.*, but it was stated in evidence

that this value was not actually arrived at until about the end of 1918.

For the appellant it was contended that the patent had a capital value for excess profits duty purposes, as was evidenced by the good trading results of the year ending April 5, 1918; that those results justified him in placing a value of 6000*l.* on the patent; that the capital value of a patent while it remained in the hands of, and was worked by, the inventor should not be restricted to mere outlay; that if the patent had been sold the purchase price would have constituted capital, and that it represented capital none the less because as a fact it was not sold.

For the respondents it was contended that in the absence of any evidence of greater value the patent should be taken to be worth only what had been spent upon it; that the value of 6000*l.* was a pure estimate arrived at after the results of the year's trading had been ascertained. They relied upon para. 1 (*c*), Part III., Sch. IV., of the Finance (No. 2) Act, 1915. (1)

The Commissioners found that the value of the patent at the time when it became an asset of the business was 400*l.* and no more, and, giving effect to that finding, they reduced the duty charged by the amount agreed between the parties.

Eastham for the appellant. The Commissioners were wrong in finding the value of the patent to be 400*l.* only. There was no evidence to support that finding. 400*l.* was the sum expended in obtaining the patent, and not its value. An inventor might spend a large sum of money on experiments and patent fees, and yet his patent might be worthless. In this case the trading for the year in question showed that the patent had a much greater value than 400*l.*, and the only evidence adduced as to the value was 6000*l.*, which

(1) Finance (No. 2) Act, 1915, Sch. IV., Part III., para. 1: "The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be—

". . . . (*c*) So far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the trade or business. . . . ."

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should be accepted. Though the value has to be taken at the time the asset becomes an asset of the trade or business, it is permissible to inquire what profit has been derived by its use. The effect of the Commissioners' finding is unfair. The purchaser of a patent would be able to include as an increase of capital the price paid for the patent, yet the patentee, if he does not sell his invention, can only take as increased capital the mere outlay incurred by him in taking out the patent. That cannot be right. The patent must be given a value taking into account the anticipated yield of profit by its use, and if at the time the assessment is made the patent has been in use and has yielded a profit, that fact can be given in evidence to support the estimated value put upon it.

Sir Ernest Pollock S.-G. and *R. P. Hills* for the respondents were not called upon to argue.

ROWLATT J. In this case the question is what the appellant, who is liable to pay excess profits duty, should be allowed as capital introduced into his business.

During the year in question the appellant took out a patent for an invention. It cost him 400*l.* to do so. There is no evidence that when he took out the patent the advantages of the invention were so obvious that the patent, at that moment, had any value. Many patents are worth nothing like the money that has been spent upon them. The value of this patent lay in the future, and undoubtedly the appellant achieved considerable success with it. When this question came before the Commissioners it was contended on behalf of the respondents that in the absence of any evidence of greater value, the patent should be taken to be worth only the sum that had been spent upon it. I do not think that that was put forward as the true measure of its value as a matter of law. If it was, I think it was too favourable to the subject, because although a million may have been spent upon a patent its value may be nil. I think the respondents' view was that 400*l.* was a fair value in the circumstances, and I read the Commissioners' finding as meaning that this patent

was one with an uncertain future, so far as the market was concerned, and that although it proved a success it had not at the moment when it became an asset of the appellant's business any increased value. I cannot disturb that finding. Mr. Eastham contended that when the value of a thing which has not been acquired by purchase has to be estimated, subsequent facts should be looked at. In a sense that is true. But when the Legislature directs the value of a thing to be taken at the moment when it comes into existence, that means that the value must be arrived at by the persons who are called upon to fix it as it appears to them at that moment. It is not admissible to say at that time, when its future is uncertain, that its value is the sum which those persons, if they had the gift of prophecy, could foresee that it would attain. The appeal fails.

Appeal dismissed.

Solicitors for appellant: *Thompsons, Quarrell & Jones for C. H. Pickstone, Radcliffe, Lancashire.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

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Oct. 13, 14.

CAPE BRANDY SYNDICATE *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Excess Profits Duty—Business having no pre-war Existence—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 40, *Sch. IV., Part II.—Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *ss.* 45, *sub-s.* 2, 69.

The provisions of the Finance (No. 2) Act, 1915, taken by themselves, do not impose excess profits duty on trades or businesses commenced after the outbreak of war on August 4, 1914. But the provision of s. 45, sub-s. 2, of the Finance Act, 1916 (which Act by virtue of s. 69 is to be construed together with the material sections of the Finance (No. 2) Act, 1915), that "in the case of trades or businesses commencing after August 4, 1914, the rate of [excess profits] duty shall be sixty per cent. of the excess in respect of any accounting period ending after August 4, 1915," must be treated as an exposition of the law by Parliament that trades or businesses commenced since August 4, 1914, are within the scope of the Finance (No. 2) Act, 1915, and therefore liable to pay excess profits duty.

CASE stated by Commissioners for the Special Purposes of the Income Tax Acts.

In October, 1919, the appellants, Mr. Norris, Mr. White, and Mr. Browning (called for the purposes of the assessments and this appeal the "Cape Brandy Syndicate"), appealed against assessments to excess profits duty for the accounting periods March 11, 1916—December 31, 1916, and January 1, 1917—September 17, 1917. The three appellants were members of different firms, but the assessments in question were made in respect of profits arising from certain transactions undertaken by them on their joint account and not on behalf of their respective firms. In 1916 the appellants agreed to purchase certain brandy from the Cape Government on joint account. They first bought 100 casks, at the same time inquiring how much more was available, and, later in the same year, they bought two further lots of 1500 casks each. These 3100 casks constituted the whole amount the Cape Government had to offer, and the fact that the purchase was made in three instalments was because the appellants were not aware, in the first instance, how much there was for sale. Their intention was to buy all that was available. After the

purchase the appellants sold some of the brandy for shipment to the East; the remainder they shipped to London, where, on its arrival, it was blended with French brandy purchased by the appellants for the purpose. The brandy so blended was sold on commission on behalf of the appellants. There were about 100 transactions of sale in all, the first taking place on July 1, 1916, and the last on September 17, 1917. The appellants received the profits of the sales after deduction of the agents' selling commissions and the expenses incurred on the appellants' behalf. It was admitted that the appellants' intention in purchasing the brandy was to sell the whole of it at a profit. None of the appellants had previously or since been engaged in a similar transaction.

For the appellants it was contended that the profits in question were capital profits on the realization of a speculative investment, and were not profits arising from any trade or business carried on by the appellants; that an isolated and exceptional transaction did not amount to the carrying on of a trade or business; alternatively, that if the profits arose from a trade or business, the trade or business did not commence until 1916, and any profits arising from a business commencing after August 4, 1914, were not chargeable to excess profits duty.

For the respondents it was contended that the profits in question arose from a trade or business carried on by the appellants, and were chargeable to excess profits duty.

The Commissioners upheld the respondents' contention.

Hon. Sir William Finlay K.C. (*Bremner* with him) for the appellants. First, the profits in question do not arise from any trade or business carried on by the appellants but are capital profits on the realization of a speculative investment: *Hudson's Bay Co.* v. *Stevens* (1), and *Tebrau* (*Johore*) *Rubber Syndicate* v. *Farmer*. (2) The carrying on of a business involves a continuity of transactions: *Inland Revenue Commissioners* v. *Sangster* (3), and that element is absent

(1) (1909) 5 Tax Cas. 424. (2) 1910 S. C. 906; 5 Tax Cas. 658.
(3) [1920] 1 K. B. 587, 596.

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in this case. The profits in question are therefore not liable to duty.

Secondly, even if the appellants can be said to have been carrying on a trade or business in the purchase and sale of the brandy, they are nevertheless not liable to pay excess profits duty, inasmuch as the business was commenced after August 4, 1914. This point turns upon the construction of certain sections of the Finance (No. 2) Act, 1915, which first imposed excess profits duty. Sect. 38, sub-s. 1, of that Act provides that "there shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded, by more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to 50 per cent. of that excess." That is the charging section. By s. 40, sub-s. 2, the pre-war standard of profits is to be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer, and by the same sub-section it is enacted that the provisions of Sch. IV., Part II., of the Act shall have effect with respect to the computation of the profits of a pre-war trade year. The material clause of Sch. IV., Part II., is para. 4, which, after dealing with the case where there have not been three, but only two, pre-war trade years, and the case where there have not been two pre-war trade years, but only one, provides that "where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period." That last provision is dealing with the case where there has been a pre-war trade or business but for a less period than one year. That legislation therefore is dealing exclusively with businesses which have had some pre-war existence. The very name of the duty shows this, the duty being, not on profits, but on excess profits, that

is, on the excess of the profits of the post-war period over those of the pre-war period. Sect. 45, sub-s. 2, of the Finance Act, 1916, will doubtless be cited against this contention. That sub-section provides (inter alia) that "in the case of trades or businesses commencing after August 4, 1914, the rate of duty shall be sixty per cent. of the excess in respect of any accounting period ending after August 4, 1915." That no doubt suggests that Parliament assumed that businesses commenced since the outbreak of war came within the scope of the Finance (No. 2) Act, 1915, but that erroneous assumption cannot alter the plain language of the charging section of the Act of 1915 which is clearly limited to businesses commenced before the outbreak of war. Moreover, the Act of 1916 is now superseded by the Finance Act, 1917, which does not contain the above quoted provision of the Finance Act, 1916. [*Inland Revenue Commissioners* v. *Gittus* (1) was referred to.]

Sir Ernest Pollock S.-G. (*R. P. Hills* with him) for the respondents was called upon to argue the second point only. All trades or businesses, post-war as well as pre-war, are brought within the scope of the Finance (No. 2) Act, 1915. Sect. 39 of that Act defines the trades or businesses liable to excess profits duty as "all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom," with certain immaterial exceptions. Bearing in mind that "all trades or businesses" are dealt with, the words of para. 4 of Part II., Sch. IV., "where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period," must be read as meaning where there has not been any pre-war trade year. The argument for the appellants that the words mean "where there has not been a complete pre-war trade year" puts an unduly narrow construction upon the language used. That the respondents' view

(1) [1920] 1 K. B. 563, 581.

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that the Act of 1915 includes post-war trades or businesses is put beyond doubt by s. 45, sub-s. 2, of the Act of 1916, which Act is for this purpose to be read as one with the Act of 1915: see s. 69 of the Act of 1916. In *Attorney-General* v. *Clarkson* (1) Sir Francis Jeune said: "If the Legislature in one Act have used language which is admittedly ambiguous, and in a subsequent Act have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the Legislature have acted as their own interpreters of the earlier Act." That principle applies in the present case. If there was any doubt as to the effect of the Act of 1915 that doubt has been removed by the Act of 1916. Parliament has put a particular interpretation upon the Act of 1915, and that interpretation has the same binding authority as the interpretation of a Court of law.

[He also cited *Young* v. *Leamington Corporation*. (2)]

Hon. Sir William Finlay K.C. in reply. Where the Legislature has in an Act of Parliament used language which is ambiguous, and in a later Act has used language which shows what meaning it attached to that in the earlier Act, I concede that the earlier Act is to be construed in the light of the words used in the later Act. That was the principle enunciated by Sir Francis Jeune in *Attorney-General* v. *Clarkson* (1), but it has no application in this case. The Finance (No. 2) Act, 1915, is a taxing Act, and must be construed strictly. There is no ambiguity in the language of the charging section of that Act—s. 38—calling for any exposition by the Act of 1916. The latter Act varies the rate on the assumption that a charge is already imposed. As is said in Maxwell's Interpretation of Statutes, 6th ed., p. 544, "an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it": see *Pitman* v. *Maddox* (3) and *Allen* v. *Flicker*. (4) Applying that principle to the present case, the fact that Parliament erroneously thought that

(1) [1900] 1 Q. B. 156, 165.
(2) (1883) 8 App. Cas. 517, 526.
(3) (1699) 2 Salk. 690.
(4) (1839) 10 Ad. & E. 640.

post-war businesses came within the Act of 1915 is of no effect.

ROWLATT J. held that the question whether the appellants carried on a trade or business was a question of fact and that there was evidence before the Commissioners entitling them to find as they did. [He then continued:] I now come to the consideration of the second point which is an extremely troublesome one. It is contended on behalf of the appellants that as this business was commenced after August 4, 1914, it is not liable to pay excess profits duty. That duty, it is said, can only be charged where there has been a pre-war business.

Excess profits duty was imposed by the Finance (No. 2) Act, 1915, s. 38 of which provides that "there shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded, by more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess." Therefore the charge is on the amount by which profits made since the outbreak of war have exceeded what is called the pre-war standard of profits. Sect. 39, which is strongly relied upon by the Solicitor-General, says that "the trades and businesses to which this Part of this Act applies are all trades or businesses . . . . of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom" with certain exceptions. The section does not say "carried on or to be carried on," and as it does not say that I do not think that it carries the matter any further. So far, therefore, we find all trades and businesses taxed on the excess in the amount of profits made in the accounting period after the outbreak of war over the pre-war standard of profits. What is the pre-war standard of profits? Sect. 40, sub-s. 2, says that "the pre-war standard of profits . . . . shall, subject

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to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years." That expression "pre-war" is an adjective coined in the circumstances of the last few years and here it clearly means the three trade years preceding the outbreak of war on August 4, 1914. Later in the same sub-section it is provided that "the provisions contained in Part II. of Schedule IV. to this Act shall have effect with respect to the computation of the profits of a pre-war trade year." Turning now to Part II. of Sch. IV., we find that para. 1 says that "the profits of any pre-war trade year shall be computed on the same principles and subject to the same provisions as the profits of the accounting period are computed." Paras. 2 and 3 are not material. Para. 4 provides as follows: "Where owing to the recent commencement of a trade or business there have not been three pre-war trade years but there have been two," the standard of profits shall be taken in a certain way, "and where there have not been two pre-war trade years" the standard of profits is to be taken in another way, and then come the words upon which everything turns: "And where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period." In the case of a company which has commenced business after the outbreak of war there has, of course, been no pre-war trade year. The words "where there has not been one pre-war trade year," in the collocation in which they are found, seem to me to mean "where there has been less than one pre-war trade year." The Legislature has hitherto been speaking of nothing else but cases where there is something pre-war and something post-war. The construction contended for on behalf of the respondents involves taking the statutory percentage on the average amount of capital as being the pre-war standard of profits although there is nothing pre-war about the trade or business. Para. 4 provides a method of quantifying the profits of a trade or business having both a

pre-war and post-war existence, which it would be difficult to quantify in the ordinary way. The respondents' contention involves an extremely artificial construction of the words and imports into the expression "pre-war standard" something having no connection with anything to which the term "pre-war" can properly be employed. It is urged by Sir William Finlay that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Applying those principles to this case I find it quite impossible to hold that this tax has been imposed by the Finance (No. 2) Act, 1915, upon a person who had no pre-war trade or business.

But the matter does not rest there, and I have now to consider a still more difficult question. By the Finance Act, 1916, the excess profits duty is continued, and the Act of 1916 is to be read with the Act of 1915. By s. 45, sub-s. 2, of the Finance Act, 1916, it is provided (inter alia) that "in the case of trades or businesses commencing after August 4, 1914, the rate of duty shall be sixty per cent. of the excess in respect of any accounting period ending after August 4, 1915." Parliament in so enacting certainly legislated upon the footing that post-war businesses were already charged by the Act of 1915, and it has been urged by the Solicitor-General that that concludes the matter in favour of the Crown. He cited, among other authorities, the judgment of Sir Francis Jeune in *Attorney-General* v. *Clarkson* (1) which makes it quite clear that if I had been construing the Finance Act, 1916, alone, I should have been bound, having regard to

(1) [1900] 1 Q. B. 156, 165.

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the fact that I have to read the two Acts together, to hold that Parliament had in 1916 imposed, not in direct words but by necessity, this tax on trades and businesses commencing after August 4, 1914. But I am not construing the Act of 1916, I have to construe the Act of 1915, which does not contain the words I have quoted. Sir William Finlay drew my attention to a series of cases which decided that an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it. But that principle does not cover this case. The decisions cited by him were given in cases in which argumentatively and indirectly it was suggested that Parliament thought the law to be different from what it in fact was. Thus, where a statute enacted that a trader's shopbooks should not be evidence above a year before action, it was held that that did not make them evidence within the year, though Parliament thought that they were. In the present case Parliament is saying that the two Acts—of 1915 and 1916—are to be read together, and it provides that the tax shall be levied on businesses of this character—that is, on post-war businesses.

I have come to the conclusion that s. 45, sub-s. 2, of the Act of 1916 extends the scope of the Act of 1915. I must treat this exposition in the Act of 1916 in the same way as if it had been given by a Court binding upon me, compelling me to construe the Act of 1915 in a way that I could not otherwise have done. It is true, as Sir William Finlay has argued, that the Act of 1916 only fixes the rate of the tax. That is the best way in which it can be put for the appellants, but it does not conclude the matter in view of the provision that the two Acts are to be read together. Although there is no authority precisely in point, the only effect I can give to the legislation is to say that the interpretation of the Act of 1915 given by the Act of 1916 must enure for the purposes of construing similar Acts, although not containing the same words as the Act of 1916.

I wish I could have decided this case without seeming to reflect upon the language of the Legislature. I can only say that I consider that Parliament has bound me by

authority, if one may put it in that way, or has amended the Act of 1915 by reason of what it said in 1916. If I am wrong in that principle and right in the view that the Act of 1915 taken by itself does not impose the tax in a case like this, the appellants ought to succeed, but as it is they fail and the appeal must therefore be dismissed.

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CAPE BRANDY SYNDICATE v. INLAND REVENUE COMMISSIONERS.

Appeal dismissed.

Solicitors for appellants: *Mackrell & Ward.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

MOORE AND COMPANY *v.* LANDAUER AND COMPANY.

1920
Oct. 25.

Sale of Goods—Canned Fruits—Express Term as to Mode of packing—Breach—Right to reject.

In a contract for the sale and purchase of tins of canned fruits, the buyers stipulated that they should be packed in cases containing thirty tins each, payment to be per dozen tins. The sellers tendered the whole quantity ordered, but about one-half was packed in cases each containing twenty-four tins only. The umpire found that the market value of the consignment was not affected thereby:—

Held, that the buyers were entitled to reject the whole consignment, and were not bound to accept the cases properly packed while rejecting the rest.

AWARD in the form of a special case stated by an umpire in an arbitration.

By a contract dated June 14, 1919, the claimants, Moore & Co., Ld. (herein called the sellers), sold to the respondents, Landauer & Co. (herein called the buyers), a large quantity of tins of Australian canned fruits consisting of pears, apricots, plums and apples at a specified price per dozen tins, "shipped per S.S. *Toromeo*." The tins were to be packed in cases containing thirty tins each. As to about one-half of the consignment it arrived in cases containing twenty-four tins only; the remainder contained thirty tins each as stipulated. At the date of the contract the goods

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were already on the *Toromeo*, which had sailed with them from Hobart in May, 1919. Owing to strikes in Australia and South Africa the vessel was so greatly delayed that she did not arrive at London until January, 1920. On the goods being tendered the buyers refused to take delivery on several grounds (inter alia) that they were entitled to reject because of the fact that half of the cases contained twenty-four tins each instead of thirty. The dispute was referred to arbitration and the umpire, on the disagreement of the arbitrators, gave his award in favour of the sellers subject to the opinion of the Court on (inter alia) the question, "whether in law under the above contract the buyers are bound to accept any goods packed twenty-four tins in a case, and if not whether the buyers can reject the whole tender or must accept that part of it which comprises the cases packed thirty tins in a case." He found as a fact that there was no difference in the market value of the goods whether packed thirty or twenty-four to the case.

R. A. Wright K.C. and *Costello* for the buyers. The buyers were entitled to reject these goods. The tender of a consignment containing cases which were packed with twenty-four tins instead of thirty as stipulated for was not a good tender, for the goods tendered were not the goods ordered. The finding of the umpire that the value of the consignment was not affected makes no difference, the reason being that the buyers may have made their arrangements with their customers in contemplation of the goods being delivered packed as ordered. The mode of packing goes to the description of the goods : *Makin* v. *London Rice Mill Co.* (1)

The contract is an entire one and not severable, and the buyers are not bound to accept the cases properly packed. If the sellers had tendered the properly packed cases only, the buyers would clearly have been entitled to reject for short delivery : Sale of Goods Act, 1893, s. 30, sub-s. 1 ; the addition of something else not in the contract—namely, the improperly packed cases—cannot affect that right of rejection.

(1) (1869) 20 L. T. 705.

Stuart Bevan K.C. and *H. H. Joy* for the sellers. The buyers were not entitled to reject. It is contended on their behalf that the finding that the market value of the goods was unaffected by the packing is immaterial; but it must be material on the question whether the term as to packing is a condition going to the root of the contract, or a warranty the breach of which gives a right to damages only. It is submitted that it is the latter. It is to be observed that in *Makin* v. *London Rice Mill Co.* (1) the question of the value of the rice was left to the jury. The buyers are at least bound to accept the goods properly packed, for the contract is easily severable. But the real answer to the buyers' claim is that payment was to be per dozen; it was a dozens contract, and the particular mode of packing was a matter of indifference.

Wright K.C. replied.

ROWLATT J. In this case there was a contract for the sale of a large number of tins of canned fruits of various kinds, to be packed in cases, each case to contain thirty tins, the price being payable at per dozen tins. At the date of the contract the steamship *Toromeo* with the goods on board had already sailed, but she did not arrive until a wholly unreasonable time afterwards, owing to causes for which the sellers were not responsible. It turned out, as to about one-half of the cases, that they contained twenty-four tins only instead of thirty. The award was in favour of the sellers, subject to the question (inter alia) whether the fact that some of the goods were packed in cases containing twenty-four tins instead of thirty entitled the buyers to reject the whole consignment or only the cases containing twenty-four tins. The arbitrator, in dealing with this question, seems to have brushed it aside as an afterthought of the buyers. But it seems to me clear that on the construction of the contract the buyers were entitled to say: "We must have the goods packed in the way we have contracted for." I cannot speculate as to the effect this alteration in the mode of

(1) (1869) 20 L. T. 705.

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packing would have in the trade; the buyers may have their particular reasons for preferring to have their goods packed in a certain way, and I cannot see on what grounds it is said that they are bound to take them packed in another way. The fact that in this case the value of the goods on the market, so packed, was unaffected, makes no difference.

The point remains whether the buyers were entitled to reject the whole consignment, or whether they were bound to take those cases which were packed in accordance with the contract. I do not think they were bound to accept them. Sect. 30 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), deals with three cases. In the first, sub-s. 1 enacts that where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. The second case is not here material. In the third case sub-s. 3 enacts that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. The words "mixed with" in sub-s. 3 cannot refer to physical confusion but are equivalent to "accompanied by." In the present case, if half only of the goods—namely, those properly packed—had been tendered, the buyers could have refused to accept them under s. 30, sub-s. 1. It is said that because they were accompanied by something else not in the contract—namely, the goods improperly packed—the buyers were bound to accept the goods properly packed. I cannot agree with that contention. [The learned judge proceeded to deal with further contentions of fact by the buyers.]

On these grounds I think the award must be in favour of the buyers.

Judgment for buyers.

Solicitors for the buyers: *F. C. Mathews & Co.*
Solicitors for the sellers: *Morgan Veitch & Bilney.*

W. L. L. B.

DEY *v.* PULLINGER ENGINEERING COMPANY.

1920
July 20, 21, 30.

Company—Liability on Bills of Exchange—Bills drawn on behalf of Company by Official—Implied Authority—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 77.

The articles of association of a company empowered the directors to authorize one of their body as managing director to draw bills of exchange on behalf of the company. The managing director drew a bill on behalf of the company without having in fact received any authority from the directors to draw bills. In an action on the bill against the company as drawers :—

Held, that the managing director, in drawing the bill on behalf of the company, was a "person acting under its authority" within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, and that the company was liable. As by the constitution of the company the managing director might have been authorized to draw the bill, a person taking the bill in due course was entitled to assume that he had authority in fact.

Premier Industrial Bank v. *Carlton Manufacturing Co.* [1909] 1 K. B. 106 dissented from.

Appeal from the judgment of a Master on the trial of an action under Order xiv., r. 7.

The action was brought to recover the sum of 2000*l.* from the defendant company as drawers of a bill of exchange for that amount dated November 12, 1919. The bill was drawn "p.p. Pullinger Engineering Co." by "H. J. Pullinger, Managing Director; E. T. Bedford, Director; and Thomas Howe Williams, Secretary," upon Thomas Howe Williams in his private capacity and payable to the defendant company's order. It was accepted by the drawee, but dishonoured at maturity. The plaintiff was, as the Master found, a holder in due course. The defence to the action was that the persons drawing the bill had no authority to draw it on the company's behalf. One of the objects of the company, as appeared from clause 3, para. (13), of the Memorandum of Association, was "to draw, accept, endorse, and negotiate, promissory notes, bills of exchange," etc. By art. 73 of the Articles of Association "The directors may from time to time appoint one or more of their body to be managing director or managing directors . . . . upon such terms as to the duties to be performed the powers to be exercised and all other matters

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as they think fit, but so that no managing director shall be invested with any powers or entrusted with any duties which the directors themselves could not have exercised or performed." And by art. 75: "The business of the company shall be managed by the directors who . . . . may exercise all such powers of the company . . . . and do on behalf of the company all such acts as may be exercised and done by the company." H. J. Pullinger had been duly appointed managing director of the company, but it appeared from the minutes of the company that no resolution had ever been passed by the directors authorizing them to draw bills of exchange on behalf of the company. The Master was of opinion that he was bound by the decision of Pickford J. (now Lord Sterndale) in *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1) to hold that the bill was not drawn on behalf of the company by a "person acting under its authority" within s. 77 of the Companies (Consolidation) Act, 1908 (2), and accordingly gave judgment for the defendants.

The plaintiff appealed.

Beyfus for the plaintiff.

Patrick Hastings K.C. and *Swords* for the defendants.

The arguments of counsel sufficiently appear from the judgments.

Cur. adv. vult.

July 30. BRAY J. This was an action on a bill of exchange for 2000*l.* dated November 12, 1919, purporting to be drawn by H. J. Pullinger, Managing Director; E. T. Bedford, Director; and Thomas Howe Williams, Secretary, on behalf of the defendants the Pullinger Engineering Co., accepted by Thomas Howe Williams and indorsed by the drawers to the plaintiff. Proceedings were taken under Order XIV., and by r. 7 of that order it was ordered to be

(1) [1909] 1 K. B. 106.

(2) By s. 77 of the Companies (Consolidation) Act, 1908: "A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

referred to a Master. The Master tried the action and decided in favour of the defendants. This is an appeal from that decision. It was admitted before the Master and before us that the plaintiff was a holder in due course. It therefore becomes unnecessary for me to go into the circumstances under which the plaintiff became the holder. The Master held that it had not been drawn by any person acting under the authority of the defendant company within the meaning of s. 77 of the Companies (Consolidation) Act, 1908. He thought the case was covered by the *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1) There are some differences between the facts in that case and the present, but in principle it cannot in my opinion be distinguished. In the present case there is included in the objects for which the company is established in the Memorandum of Association, para. (13), "to draw, accept, endorse, and negotiate. . . . bills of exchange, etc." In the Articles of Association there is, under the head of "Managing Directors," art. 73, which gives power to the directors to appoint a managing director and give him power to exercise any duties which the directors could have exercised. Under the head "Powers of Directors" the directors under art. 75 may exercise all such powers and do on behalf of the company all such acts as might be exercised and done by the company subject to certain exceptions which do not apply in this case. It is clear, therefore, that anyone looking at the Memorandum and Articles of Association would see that the managing director might have the power to draw and indorse this bill. It was the same in the case before Lord Sterndale. Now this being a decision of a single judge is not binding on us, but we ought not to differ from it unless we can clearly see that it was wrong. It decided that a holder in due course bringing an action on a bill of exchange against a company as drawers, indorsers or acceptors must show that the person or persons who actually drew, indorsed or accepted the bill was or were authorized in fact to do so by the company, although it purported to be and was in fact signed by the directors on behalf of the company

(1) [1909] 1 K. B. 106.

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in the form usually adopted by companies. If this be good law it would certainly strike a blow against the negotiability of companies' bills. A holder in due course cannot as a rule be expected to know what goes on in the company's board room, and if he has to take the risk of its turning out that the persons signing had no authority, and much more so if he has to prove that they had authority, people in business would be very shy in dealing with such bills. I will proceed to examine the grounds on which Lord Sterndale founded his judgment. After setting out the facts and reading parts of the Memorandum and Articles of Association which, as I have said, do not differ in any important respect from those here, he deals with a number of cases which clearly show that in the case of contracts the law is otherwise. Persons dealing with companies are bound to look at what may be called "the outside position" of the company, but not at what may be described as their "indoor management": see the judgment of Lord Halsbury in *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (1) In *Biggerstaff* v. *Rowatt's Wharf* (2), where the question was whether an assignment of debts by the company to the plaintiff was valid, Lindley L.J. says (3): "It is said that the company are not bound by those orders because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person

(1) [1895] 1 Ch. 629, 633. (2) [1896] 2 Ch. 93.
(3) Ibid. 102.

taking it is entitled to assume that they had the power. The hypothecations, therefore, are in my opinion valid." And Kay L.J. says (1): "Each of these orders was in the form of a notice of hypothecation, signed on behalf of the company by Mr. Davy as managing director. Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing ultra vires of a managing director; and it would be extraordinary if a person dealing bona fide with the managing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly." I need not go through these authorities because counsel for the defendants frankly admitted that if this were a contract and not a bill of exchange the plaintiff would be entitled to succeed.

Now as to bills of exchange. In *In re Land Credit Co. of Ireland* (2) the Court had to deal with a claim on bills of exchange, and Selwyn L.J., after reading s. 47, says: "The question still remains, who is properly to be considered a person acting under the authority of the company, and that matter, I think, has been settled by the several decisions to which reference has been made, the effect of which is very concisely and clearly summed up by the present Lord Chancellor in *Fountaine* v. *Carmarthen Ry. Co.* (3) His Lordship says: 'In the case of a registered joint stock company all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the

(1) [1896] 2 Ch. 106.
(2) (1869) L. R. 4 Ch. 460, 468.
(3) (1868) L. R. 5 Eq. 316.

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directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (1), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*.' (1) That case of *Royal British Bank* v. *Turquand* (1) may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned." The Lord Justice therefore clearly holds that the principles laid down in the cases dealing with contracts apply also to bills of exchange. Having cited these authorities Lord Sterndale in a very few sentences holds that they are not applicable, because of the words of s. 47 of the old Act, now re-enacted as s. 77 in the Act of 1908, "in the name of the company . . . . or . . . . by or on behalf or on account of the company, by any person acting under the authority of the company." He says after reading the section (2): "I think the words of the section 'if accepted by any person acting under the authority of the company' must mean something more than a person who might by a certain delegation of power given to him have been authorised and have been thus acting under the authority of the company." He gives no further reason. He does not deal with the judgment of Selwyn L.J. in *In re Land Credit Co. of Ireland* (3) nor does he say why the case of contracts should be distinguished from those of bills. Mr. Hastings for the defendant made a great point of the fact that the words "express or implied" appear in the section dealing with contracts, s. 76, sub-s. 1, whereas there were no such words in the section dealing with bills. As a matter of history it appears that in the Joint Stock Companies Act, 1856, s. 43,

(1) (1856) 6 E. & B. 327. (2) [1909] 1 K. B. 115.
(3) (1869) L. R. 4 Ch. 460, 468.

which deals with bills, did contain the words "express or implied," and these words also appear in the contract section (s. 41). In the Act of 1862 the section dealing with bills is s. 47, and there the words "express or implied" are omitted. There is no section in that Act relating to contracts, but the contract section appears again in the same words as before in the Act of 1867 as s. 37. I do not think there is anything in the history of s. 77 to justify me in construing the word "authority" otherwise than according to its natural and ordinary meaning. An "authority" may be express, or implied, or apparent, and I can see no reason for inserting the word "express" before it in s. 77. It may be that in the Act of 1862 it was thought better to omit the words "express or implied" as possibly limiting its meaning. It is to be observed that similar words are used in s. 91, sub-s. 1, of the Bills of Exchange Act, 1882. I know of no decision on that section, but from the note in Chalmers' Bills of Exchange on this section it would appear that before the Act implied authority was sufficient. I think the contention that in reading s. 77 the word "authority" is to be construed as express authority fails. Against the authority of Lord Sterndale is the authority of Selwyn L.J. and Giffard L.J. in *In re Land Credit Co. of Ireland.* (1) The reasoning of those learned judges in that case is to me convincing, and I feel myself compelled to hold that Lord Sterndale's decision was wrong, and that the decision of the Master, which was founded on it, was wrong.

The question then arises whether we ought to enter judgment for the plaintiff, or whether we can only send the case back to the Master to hear any evidence that the defendants desire to call. It was not suggested in the argument before us that any evidence could be given except to show that in fact the persons drawing and indorsing this bill had no authority to do so, and were in fact acting in fraud of the company. I will assume that they proved this, still I should hold that the plaintiff must succeed, it being admitted that he was a holder in due course without notice of the fraud. I think

(1) L. R. 4 Ch. 460.

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the appeal must be allowed and judgment entered for the plaintiff with costs here and below.

SANKEY J. read the following judgment: In this case the plaintiff claimed 2000*l.* from the defendant company as drawers of a bill of exchange for that amount accepted payable at the London, Singapore and Java Bank, Ld., by Thomas Howe Williams, of which bill the plaintiff was the holder for value, and which bill was duly presented for payment and dishonoured, of which Thomas Howe Williams and the defendant company had notice. The bill was drawn by one Pullinger, the managing director and one Bedford, a director, and countersigned by Thomas Howe Williams, the secretary of the defendant company. The defendants contended that it was never drawn and indorsed within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, because the managing director had not in fact power to bind the company. The power of a managing director is contained in art. 73 of the Articles of Association of the Company, which is as follows: [His Lordship read the article.] It is therefore clear that a managing director could be invested with the powers which directors themselves could exercise, and by art. 75, coupled with para. 13 of clause 3 of the Memorandum of Association, the directors had power to accept and draw bills of exchange. The trial was referred to a learned Master, who decided in favour of the defendant company, and from his decision the present appeal is brought.

The plaintiff relied upon a number of familiar cases, including *Royal British Bank* v. *Turquand* (1); *Mahony* v. *East Holyford Mining Co.* (2); *In re Land Credit Co. of Ireland* (3); *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (4); and *Biggerstaff* v. *Rowatt's Wharf* (5), which lay down the law with regard to what persons dealing with directors must look to, Lindley L.J. in *Biggerstaff's Case* saying: "They must see whether according to the constitution of

(1) 6 E. & B. 327.
(2) (1875) L. R. 7 H. L. 869.
(3) L. R. 4 Ch. 460.
(4) [1895] 1 Ch. 629.
(5) [1896] 2 Ch. 93, 102.

the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power." The plaintiff then urged that looking at art. 73 above referred to it was clear that the managing directors might have been entrusted with the power to draw bills of exchange, and that therefore he, the plaintiff, was entitled to assume that the managing director signing on the company's behalf was duly authorized, and to succeed in his claim. The defendants relied upon a decision of Pickford J., as he then was, in *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1) They further drew attention to ss. 76 and 77 of the Companies (Consolidation) Act, 1908, the first of which deals with contracts made on behalf of the company, and the second with bills of exchange and promissory notes accepted on its behalf, and pointed out that whereas in the case of contracts it is provided in s. 76 that the authority of a person acting on behalf of a company may be "express or implied," no such words are used in s. 77 dealing with bills of exchange, and that therefore the "authority" referred to in s. 77 can only mean "express" authority, which did not exist in the present case. Now, to begin with, no point can be made that s. 77, which leaves out the words "express or implied" immediately follows s. 76, which contains them. In fact, the Act of 1908 was a consolidating Act, and ss. 76 and 77 came next to one another by accident. Sect. 77 reproduces s. 47 of the Companies Act, 1862, and s. 76 reproduces s. 37 of the Companies Act, 1867. We therefore have to construe the words in s. 77 not necessarily

(1) [1909] 1 K. B. 106.

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by contrast to the words in s. 76. In my view the word "authority" in s. 77 is capable of meaning express or implied authority, and it may well be that the draftsman of the 1867 Act added the words "express or implied" in s. 37 of that Act out of greater precaution. Certainly up to the decision of Pickford J. in the *Premier Bank Case* (1) the construction of the words "express or implied authority" in s. 37 of the 1867 Act had not been held to be different from that which ought to be placed on the word "authority" in s. 47 of the 1862 Act: see *In re Land Credit Co. of Ireland* (2), where Selwyn L.J. says: [He read the passage quoted above by Bray J.] It is, in my view, impossible for us to distinguish that case upon the ground that the directors there knew of and affirmed the bill transaction in question.

The real difficulty before us is the decision in *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1), and the problem we have to solve is whether we should follow the law to be gathered from that case, or from the earlier ones above referred to. I am of opinion we ought to follow the earlier ones, and that the authority referred to in s. 77 may be either express or implied. If Parliament had desired to say that a bill of exchange could only be accepted by a person acting under the express authority of the company it would have been easy to say so. Beyond that this construction seems preferable, because to hold otherwise would be to place bills of exchange of limited companies, which circulate on the market, in a less favourable position than ordinary contracts made by such companies and than other bills of exchange. The word "authority," as above suggested, is capable of including both express and implied authority, and in s. 91 of the Bills of Exchange Act, 1882, where the word is also used, it is understood as extending to both: Chalmers' Bills of Exchange, 8th ed., p. 321. The plaintiff therefore was entitled to assume that the signature of the managing director was duly authorized, and the construction to be placed on the word "authority" in s. 77 the same as that to be placed on "authority, express or implied" in s. 76. The present

(1) [1909] 1 K. B. 106. (2) L. R. 4 Ch. 460, 468.

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case is covered by the decisions beginning with *Royal British Bank* v. *Turquand* (1), and ending with *Biggerstaff* v. *Rowatt's Wharf* (2), above referred to: see Palmer's Company Precedents, vol. i., 11th ed., p. 1159.

In my opinion the judgment of the learned Master was wrong, and the appeal should be allowed.

For the reasons given by my Lord it is not necessary to send the case down for a new trial and judgment must be entered for the plaintiff.

Appeal allowed.

Solicitors for the plaintiff: *Bono & Nimmo.*

Solicitors for the defendants: *Lloyd, Richardson & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

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July 1, 26.

IN THE MATTER OF AN ARBITRATION BETWEEN COGSTAD AND COMPANY AND H. NEWSUM, SONS AND COMPANY, LIMITED.

Practice—Appeal—Arbitration—Special Case—Decision of High Court—Right of Appeal—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 7, 19.

A special case stated by an arbitrator for the opinion of the Court is stated under s. 19 or s. 7 of the Arbitration Act, 1889, according as the arbitrator does or does not retain jurisdiction in the reference. If he retains jurisdiction the case is stated under s. 19, and no appeal lies to the Court of Appeal from the decision of the High Court upon the special case; but if he makes his award finally, and retains no further jurisdiction in the reference, the case is stated under s. 7 and an appeal lies from the decision of the Court.

By a submission contained in a charterparty disputes were referred to two arbitrators and, if they could not agree, to an umpire. The umpire stated for the opinion of the High Court a special case in which he set out the facts, decided that there had been a breach of the charterparty, and assessed damages for the breach. The award concluded with these words: "The question for the opinion of the Court is whether upon the true construction of the charterparty and the facts stated by me the decisions at which I have arrived are correct in law. If they be correct my award is to stand, but if incorrect in any

(1) 6 E. & B. 327. (2) [1896] 2 Ch. 93.

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particulars I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the Court." Bailhache J. upheld the award:—

Held, by Bankes and Warrington L.JJ. (Scrutton L.J. dissenting) that this was not a final award; that the case was therefore stated under s. 19 and no appeal lay to the Court of Appeal.

By Scrutton L.J. that the award was final; that the case was therefore stated under s. 7 and that an appeal lay.

In re Holland Steamship Co. and Bristol Steam Navigation Co. (1906) 95 L. T. 769 followed.

APPEAL from the judgment of Bailhache J. upon a special case stated by an umpire in an arbitration between Messrs. C. T. Cogstad & Co., of Christiania, the owners of the steamship *Lord*, and H. Newsum, Sons & Co., Ld., of Manchester, the charterers of the same steamer.

Clause 27 of the charterparty provided that any dispute arising under the charter should be referred to arbitration in London, one arbitrator to be appointed by the owners and another by the charterers, and, in case the arbitrators should not agree, then to the decision of an umpire to be appointed by the arbitrators, and that the award of the arbitrators or the umpire should be final and binding upon both parties.

By clause 1 the owners agreed to let and the charterers agreed to hire the steamer for six calendar months to be employed in lawful trade within specified limits. By clause 9 the captain was to prosecute his voyages with the utmost dispatch. Although appointed by the owners he was to be under the orders and direction of the charterers as regards employment, agency, and other arrangements. By clause 14 losses and damages whether in respect of goods carried or to be carried and in other respects arising or occasioned by the causes therein named were to be excepted. The causes named included "negligence, default, or error of judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer."

A dispute arose between the parties. The charterers alleged that the captain had not prosecuted the voyage with due dispatch and that therefore the owners had committed a breach of clause 9. The owners said that the delay if any was through an error of judgment of the master in the navigation

of the steamer within clause 14, and that they were excused from liability. Arbitrators were appointed. Failing to agree they appointed Mr. F. Newson as umpire.

The award of the umpire, after reciting his appointment and the disagreement of the arbitrators proceeded as follows: "Now I the said F. Newson having upon the disagreement of the arbitrators taken upon myself the burden of the said arbitration and having been requested to make my award in the form of a special case for the opinion of the Court do hereby make my award accordingly." He then proceeded to find the facts as follows:—

1. By the terms of the charterparty of April 8, 1916 (copy of which was to form part of the case) it was provided that the *Lord* should be chartered to the charterers for the term of six calendar months with charterparty limits as per clause 1 which included the White Sea (including Messane (1)) in season.

2. The *Lord* was duly delivered by her owners to perform the service required under the charter and on September 4, 1916, was sublet by the charterers to A. Croker & Co., Ld., of Liverpool for an outward voyage from Liverpool to Archangel to load a general cargo for this port. The charterers had on August 31 engaged the *Lord* to bring a cargo of staves from Archangel to Garston to be loaded after discharge of the outward cargo at Archangel.

3. Clause 31 of the charterparty provided that "the charterers have no right to send steamers on a voyage which has not been beforehand approved by the directors of the Norwegian War Insurance Association." The voyage in question was duly approved by the directors of that association, but in the formal letter of authority given by the association to the owners on September 28, 1916 (to which letter the charterers were not privy), it was provided that the authority for the voyage might be rescinded by the association at their discretion. The association provided a scheme of insurance against war risks very similar to that provided by the War Risks Association formed in the United

(1) Sic. Quære Mezen.

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Kingdom; but, whereas in this country entry of steamers was at the option of the owners, it was compulsory on all Norwegian steamers to be entered for their marine insured value in the association.

4. On the afternoon of Thursday, September 26, 1916, the *Lord* was loaded, and at 9 P.M. on that day she sailed on her voyage. As to the route to be pursued, beyond the necessary instructions to proceed to Archangel the captain was not instructed either by the charterers or the sub-charterers, and the *Lord* being a neutral vessel was not controlled by instructions issued by the Admiralty.

5. At this time there was, as was well known to all the parties from the inception of the charterparty, considerable danger from German submarines both off the British Isles and also off the coast of Norway, and more particularly in the stretch between Vardö and Archangel where vessels leaving Vardö could not avail themselves of the protection of the Norwegian coastal waters.

6. Being uncontrolled in regard to route the captain of the *Lord* elected to proceed by the way of the Norwegian coast and the Norwegian territorial waters which was deemed likely to be immune from the presence of submarines. On October 2 the steamer arrived safely at Aalesund. The captain then proceeded principally inside the Norwegian territorial waters until, on October 6, he arrived at Honningswaag on the north of Norway. A captain who has taken the Norwegian coastal route must there make up his mind as to the best route for the rest of his voyage.

7. At this time, in consequence of the number of vessels which had been sunk by German submarines on the direct route from Vardö to Archangel, the route recommended by the Norwegian War Insurance Association was to keep very wide of the Norwegian coast instead of taking the direct route from Honningsvaag to Vardö and thence to Archangel. On arriving at Honningsvaag the captain of the *Lord* was informed by the commander of the Norwegian guard vessel that there were German submarines outside and east of Vardö. The captain decided to await further information. There

was nothing at this time to prevent him from proceeding immediately on the route recommended by the Norwegian War Insurance Association.

8. There were at this time five other steamers lying at Honningsvaag bound for the White Sea. The six captains including Captain Gunderson, master of the *Lord*, met in conference and decided to send to the Norwegian War Insurance Association the following telegram dated October 8: "The six undersigned masters of steamers bound for Archangel appeal to the War Insurance to be allowed not to put to sea in the present circumstances but instead to follow the coast eastwards. In that case we should presumably be safer against torpedoing and in any case there would be an opportunity of saving life. We therefore propose that we proceed through territorial waters to Vardö and proceed from thence." On October 9 a telegram was received from the Norwegian War Insurance Association that they still considered the safest route to be out at sea, unless a guard service had been established on the Murman coast. The captain of the *Lord* however still did not sail. On Tuesday, October 10, the six captains telegraphed to the Norwegian War Insurance Association: "As regards a guard service along the Murman coast, can inform you that the commander of the guard vessel from the commander of *Viking* has received the following telegram: 'Information that two German submarines have been sunk by Russian destroyer off Fiskeroon.' The information is probably correct. Anyway a battle has taken place. We consider therefore that a guard service has been established. All the vessels leave to-night at 2 o'clock and call at Vardö for fresh information and will continue from there along the coast provided nothing fresh is to hand. Telegraph to commander *Viking*." The captain of the *Lord* had also been in communication with his owners in Christiania. On October 10 he received the following reply from them: "The War Insurance does not reject your proposal but finds it best to go far out but you are free to choose your course eastward." At 2 o'clock A.M. on October 11 the *Lord* left Honningsvaag with a pilot on

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board and arrived at 6.45 P.M. at Bussesund, an anchorage off the port of Vardö. There the captain went ashore to confer with the authorities. During the captain's delay at Honningsvaag the owners although fully advised by him gave him no instruction to proceed on his voyage in accordance with the advice of the Norwegian War Insurance Association and with clause 9 of the charterparty.

9. On arriving at Vardö the captain heard that several German submarines were reported off the Russian coast. On October 12 the Norwegian War Insurance Association telegraphed to the commander of the *Viking*: "Being informed that there is a submarine off Vardö we beg you to take necessary regard hereto before you allow Archangel traders leave Vardö." The captain of the *Lord* thereupon telegraphed to the owners that he saw no prospect of getting to the White Sea. He also telegraphed to the charterers as follows: "Totally impossible reach Archangel according naval authorities' reports." The owners directed the captain to await further instructions from the Norwegian War Insurance Association which would be conveyed to him through the commanding Admiral. On October 13 the association telegraphed to the Admiral: "We agree that commander *Viking* until further orders detain the vessels in Vardö. The War Insurance undertakes the responsibility which may be involved thereby." The captain of the *Lord* accepted these instructions and remained at Vardö.

11. On October 21 the association telegraphed to the Admiral: "Please request the commander *Viking* inform our vessels that the War Insurance agrees to departures provided and as soon as the masters themselves after conference with the commander of the *Viking* consider same advisable." On October 22 the masters and the commander conferred and decided that four Norwegian steamers should leave that day and the rest of the steamers on the following day.

12. At 12.45 A.M. on October 23 three of the four steamers returned, heavy firing having been heard ahead and a German submarine having been reported in the vicinity. The fourth, the *Garibaldi*, went on and arrived safely at Archangel.

13. In consequence of this report the other steamers which were to have sailed on October 23 determined not to proceed except the *Hensfjell* which put to sea and was torpedoed soon after leaving Vardö. The crew of the *Lord* refused to go on.

14. On October 24 the following telegram from the Norwegian War Insurance Association was communicated by the commanding Admiral to the *Lord* and the other Norwegian ships: "Inform the captains of the vessels bound for Archangel that the War Insurance orders them not to proceed at present." Accordingly the *Lord* remained in port awaiting further orders until October 31. On that day the owners telegraphed to the captain: "The War Insurance consider it unsafe to proceed."

15. It was now late in the season to proceed to Archangel. In consequence of this and of a telegram from the senior British naval officer at that port, the substance of which was communicated to the charterers, the voyage to Archangel was treated as abandoned by all parties as from October 31.

16. A monthly payment of hire under the charterparty fell due on October 19. The charterers refused to pay this, and the owners under clause 5 of the charterparty by a notice which reached the charterers on November 3 withdrew the steamer from their service.

17. The captain after reaching Vardö on November 6 was ordered by the owners at the charterers' request to discharge the cargo at Trondhjem. He reached that port on November 12 and completed the discharge of the vessel on November 23.

18. The owners claimed in respect of unpaid hire, war insurance, and other expenses the sum of 7014*l.* 3*s.* 11*d.* The charterers claimed for delay of the vessel at Honningsvaag and Vardö and for the refusal of the owners to proceed to Archangel and their withdrawal of the vessel from the charterers' service the sum of 4098*l.* 10*s.* 5*d.*

The award continued in these words:—

"19. In so far as they may be questions of fact, and not of law, I beg to find as follows: (*a*) that the voyage Liverpool to Archangel was a voyage which the charterers were entitled

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to order the steamer to perform and was so accepted by the owners as a voyage duly approved by the directors of the Norwegian War Insurance Association; (*b*) that it was a voyage undertaken by the charterers in sufficient time to be considered in season; (*c*) that, in disregarding the advice of the Norwegian War Insurance Association on arrival at Honningsvaag to proceed from there direct to Archangel at a considerable distance from the Norwegian coast, the captain of the *Lord* was guilty of a grave error of judgment and was influenced thereto by fear of the consequences to himself and the crew, and that his failure to sail was a breach of clause 9 of the charterparty; (*d*) that if the *Lord* had so sailed in accordance with the advice of the Norwegian War Insurance Association there was a strong probability of her reaching Archangel; (*e*) that in giving no instructions to the captain of the *Lord* at Honningsvaag to proceed on his voyage without delay the owners of the *Lord* connived at and are responsible for the breach of clause 9 of the charter by the captain and are responsible in damages to the charterers for the failure so to proceed; (*f*) that having elected to proceed to Archangel by way of Vardö it was incumbent upon the captain to complete the voyage to Archangel; (*g*) that on October 13 the Norwegian War Insurance Association, who 'undertook the responsibility which might be involved thereby,' directed the *Lord* to remain at Vardö pending their further instructions, and the owners instructed the captain to follow such orders; (*h*) that these orders were temporary in character, and that on October 21, 1916, permission was given to proceed. The *Lord* was accordingly timed to leave Vardö on October 23, but in consequence of alarming reports the captain abandoned the attempt; (*i*) that, although attended by great danger, a successful passage to Archangel by the route chosen by the captain was at this time by no means an impossibility, as vessels had considerable protection from the prevailing weather as well as from the fact that there was darkness for about seventeen out of the twenty-four hours in those latitudes; (*k*) that the embargo against sailing continued until October 31 when, in consequence

of the lateness of the season and the weather conditions prevailing, the Allied Governments directed that a number of steamers of which the *Lord* was one should not proceed to Archangel; (*l*) that the voyage was abandoned as from that date and was frustrated; (*m*) that the owners were justified in withdrawing the steamer in consequence of the non-payment of hire, and that the measure of their damages was the charterparty rate of hire and expenses as per charterparty up to the date of discharge of the steamer at Trondhjem at noon on November 23, 1916; (*n*) that the owners committed a breach of clause 9 of the charterparty, and I assess the damages for this breach at 4586*l.* 11*s.* 4*d.*

"20. Subject to the opinion of the Court upon any point of law, I find that there is nothing due by the owners to the charterers, but that there is due by the charterers to the owners the sum of 1840*l.* 9*s.* 9*d.* in full settlement of all accounts. . . . .

"21. The question for the opinion of the Court is whether upon the true construction of the charterparty and the facts stated by me the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the Court. . . . ."

On the hearing of the special case Bailhache J. agreed with the umpire in holding that there was a default on the part of the captain of the *Lord* in not proceeding with the voyage with the utmost dispatch, and that therefore there was a breach of clause 9 of the charterparty; he also held that this was not an error of judgment in the management or navigation of the steamer within the meaning of clause 14 so as to excuse the owners. The award therefore stood.

The owners appealed.

Le Quesne (*MacKinnon K.C.* with him) for the respondents took a preliminary objection to the appeal that the special case was stated under s. 19 of the Arbitration Act, 1889 (1);

(1) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7: "The arbitrators or umpire acting under a submission shall, unless the submission expresses

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that the award was not final, and was therefore not stated under s. 7; and that consequently no appeal lay to the Court of Appeal from the decision of the learned judge. He cited *In re Holland Steamship Co. and Bristol Steam Navigation Co.* (1)

A. Neilson K.C. and *Jowitt* for the appellants. This is really a final award. The umpire recites that he has been requested to make his award in the form of a special case for the opinion of the Court, and that he has made the award accordingly. Para. 19 (*m*) and (*n*) and para. 20 of the special case show clearly that the award is intended to be final. As to the desire expressed by the umpire that if the award is incorrect it may be referred back to him, undue weight must not be given to that. Under s. 10 of the Act the Court always sends back to the arbitrator a case stated by him under s. 7 if it disagrees with him in point of law, so that the umpire is merely requesting that what will happen shall happen.

It cannot be that an award is not final unless the arbitrator anticipates all possible views of the case and says what is to be done according as one view or another is adopted by the Court. If that were so there would be very few awards under s. 7. What happens continually is that an arbitrator makes his award under that section; if the Court disagrees with him the case is remitted; but it is none the less a final award under s. 7. If the arbitrator desires the Court to do what it would do of its own motion that cannot convert a final into an interlocutory award. If para. 21 of the award had ended with the words "correct in point of law" no one could doubt that it was a final award under s. 7. The subsequent words are merely formal. The question in each case is whether the arbitrator is giving his decision without the help of the Court or whether he is asking the Court to help him to a correct decision: *In re Knight and Tabernacle*

a contrary intention, have power— (*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court. . . ."

Sect. 19: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

(1) 95 L. T. 769.

Building Society (1); *In re Kirkleatham Local Board and Stockton Water Board.* (2) This umpire has not in any way asked for help or advice; he is not invoking the consultative jurisdiction of the Court. He has made what he was asked to make, a final award, and then he has asked the Court to do its part. The award is therefore final and an appeal lies from the judgment of the Court upon the special case.

Le Quesne in reply.

Cur. adv. vult.

July 26. The following written judgments were delivered.

BANKES L.J. In this case the preliminary point is taken that no appeal lies to this Court because the special case stated by the arbitrator for the opinion of the High Court was not a final award embodied in a special case under s. 7 of the Arbitration Act, 1889, but was a case stated for the opinion of the Court under s. 19 of the same Act. It is well settled that no appeal lies to this Court if the special case is one stated under s. 19. The arbitrator has not stated on the face of the special case under which section he intended to proceed. It is necessary to arrive at a conclusion on the point from an examination of the language used by the arbitrator. The essential difference between the two kinds of special case is, I think, this: In the one case the arbitrator intends to part with the matter for good and all so far as his jurisdiction over it is concerned; in the other he intends to retain his jurisdiction, but asks the Court for its direction on some point which has arisen before him. If by the language used in a special case an arbitrator has sufficiently indicated that the matter must go back to him after the Court has expressed its opinion, in order that he may give his final opinion upon it, then the special case is one stated under s. 19 and no appeal will lie. *In re Holland Steamship Co.* (3) is a case in point. In that case the arbitrators stated their award in the form of a special case. They decided two points, and then went on to say that if the Court held that the two

(1) [1892] 2 Q. B. 613. (2) [1893] 1 Q. B. 375.
(3) 95 L. T. 769; 23 Times L. R. 59.

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points were correctly decided, then the award was to stand, but if the Court should be of opinion that either point was wrongly decided, then the matter "is to be remitted to us to give effect to the true construction of the contract in our interim and final awards." In arriving at a decision the Court laid no stress upon the particular language in which the arbitrators expressed their intention to have the case sent back to them, in the event of the Court disagreeing with their findings. What appears to have impressed the Court was that the special case did not state the question for the opinion of the Court in such a way that whichever way the Court answered that question the award would be final. On this point the present case is indistinguishable from *In re Holland Steamship Co.* (1) The arbitrator here has come to no decision in reference to the damages which may become payable in the event of the Court not accepting the decision to which he has come; but he desires that the award may be referred back to him for reassessment of the damages due in accordance with the decision of the Court if they disagree with his decisions. The only distinction which can be drawn between the present case and *In re Holland Steamship Co.* (1), is that in the one the arbitrator "desires" that the award may be referred back, and in the other the arbitrator states that the matter "is to be" referred back. I should construe both expressions as evincing the same intention—namely, to retain seisin of the case; but whether that view is the correct one or not, I think that any drawing of fine distinctions between the decisions of this Court will only add to the uncertainty and confusion produced by the present state of the law in reference to these two classes of special case. In *Shubrook* v. *Tufnell* (2) the point now under discussion was not raised. Until the law is altered, of which there is apparently some probability, I think arbitrators would be well advised when stating a special case to state on the face of the case under which section it is intended to be stated. In my opinion the objection must prevail and the appeal must be dismissed with costs.

(1) 95 L. T. 769; 23 Times L. R. 59. (2) (1882) 9 Q. B. D. 621.

WARRINGTON L.J. In this appeal from an order of Bailhache J. upon a case stated by an umpire the preliminary objection is taken that no appeal lies, because it is said the case was stated not as an award in that form, but for the purpose of obtaining the opinion of the Court in the course of the arbitration, the function of the Court being in that view consultative only. The document we have to deal with purports to be an award in the form of a special case, but I think it must be admitted that it is the duty of the Court in such matters to look at the substance and not merely at the form. The question seems to be, did the umpire intend to dispose finally of the question submitted to him or did he, in the event of the decision of the Court being of a particular nature, affect to retain seisin of the matter for further consideration and adjudication? In the present case after stating certain findings of fact and conclusions of law the umpire proceeded: "The question for the opinion of the Court is whether upon the true construction of the charterparty, and the facts as stated by me, the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the Court." Now this clearly indicates that in his view in the event of the decision of the Court being of one nature there remained a matter covered by the submission which had not been disposed of and which must be disposed of before his function as umpire would be completely fulfilled. As a mere matter of construction I should say that this special case asked for an opinion which in one event only would dispose of the matter, and in the other would leave something for the umpire to do under the original reference. But if I were of a contrary opinion I should consider myself bound by the decision of this Court in *In re Holland Steamship Co.* (1) I can find no substantial distinction between the two cases. It is true the phrase "is to be referred back" of that case is rather more peremptory than the phrase "I desire that the award may

(1) 95 L. T. 769; 23 Times L. R. 59.

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be referred back " of the present one, but in this as in the other the umpire shows that he considers the reference is not finally concluded. In *Shubrook* v. *Tufnell* (1) the present question did not arise. On the whole I agree with Bankes L.J. that the preliminary objection ought to prevail and the appeal must be dismissed.

SCRUTTON L.J. When this appeal was called on in Court objection was taken by the respondents that no appeal lay.

There are two classes of special cases under the Arbitration Act. There is first an award stated in the form of a special case for the opinion of the Court under s. 7 of the Act. From the decision of the Court on such a special case, an appeal lies: *In re Kirkleatham Local Board and Stockton Water Board.* (2) There is secondly a special case stated for the opinion of the Court at any stage of the proceedings under a reference. From the decision of the Court on this consultative case, as it is sometimes called, no appeal lies: *In re Knight and Tabernacle Building Society.* (3) The importance of the distinction has been much lessened by the recent decision of the House of Lords in *British Westinghouse Co.* v. *Underground Railways, Ld.* (4), that when the arbitrator in his final award purports to act on the consultative opinion given by the Court that opinion can be questioned by legal proceedings up to the House of Lords on the ground of error of law appearing on the face of the award. The distinction at present only adds another legal hearing to the numerous existing facilities.

In the present case the experienced umpire purports to make his award; he finds facts; he finds liability in law, and assesses damages. If his findings stand his award is final. He then says: " The question for the opinion of the Court is whether upon the true construction of the charter and the facts as stated by me the decisions at which I have arrived are correct in law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may

(1) 9 Q. B. D. 621.
(2) [1893] 1 Q. B. 375.
(3) [1892] 2 Q. B. 613.
(4) [1912] A. C. 673.

be referred back to me for reassessment of the damages due in accordance with the decision of the Court." The question is whether this award is final under s. 7, or consultative under s. 19 of the Act.

A special case under s. 19 can be stated at "any stage of the proceedings," which, in the view of Lord Halsbury in *Tabernacle Building Society* v. *Knight* (1) must be before the proceedings have come to an end by a completed award. Bowen L.J. defines the distinction in the *Kirkleatham Case* (2), as between a case where an arbitrator has stated his award in the form of a special case, and a case where he has asked the opinion of the Court by way of interlocutory proceeding in order to assist him to form his judgment. He elaborates this in *In re Knight and Tabernacle Building Society* (3) by saying: "The section"—i.e., s. 19—"contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject matter of the arbitration. . . . . The arbitrator is still clothed with the final duty of determining the case."

If the question in this case is whether the arbitrator expressed his final opinion and asked whether it was right, or whether as an interlocutory proceeding he asked a question the answer to which he could consider in making his final award, I have no doubt the former is the correct view. But it is said that a case is not final and the decision of the Court is not subject to appeal unless the arbitrator's award provides for every contingency, so that whatever view the Court takes of the questions asked the award finally determines the matter. It was said that, if the arbitrator said simply: "On the facts my final award is so and so, the question for the opinion of the Court is whether my award is correct," this though purporting to be final is merely interlocutory, and to be final the award must anticipate and provide for every possible view of the law the Court might take. This would impose a very heavy burden on commercial arbitrators.

(1) [1892] A. C. 298, 302. (2) [1893] 1 Q. B. 375, 380.
(3) [1892] 2 Q. B. 613, 619.

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But it seems also inconsistent with the decision of the Court of Appeal in *Shubrook* v. *Tufnell*. (1) There the arbitrator found the facts, stated the question, and continued: "If the Court shall be of opinion in the affirmative, then the case is to be referred back to the arbitrator. If the Court shall be of opinion in the negative, then judgment shall be entered up for the defendant with costs of suit." The Divisional Court entered judgment for the plaintiff and sent the case back to the arbitrator. On appeal to the Court of Appeal it was objected that no appeal lay, but Jessel M.R. and Lindley L.J. were clearly of opinion that an appeal lay. In that case the arbitrator had not expressed his own opinion; the case is much stronger where, as here, he expresses his final opinion. The case relied on by the appellants was *In re Holland Steamship Co.* (2) in which as it happens I was the umpire. The case was a peculiar one. The award is fully set out in the report. There was an agreement made to avoid competition providing for a pool and the joint running of two steamship lines. The agreement worked with great friction, and a permanent arbitrator was appointed, who had continually to decide what the agreement meant and what should be done. Though he came to final decisions on particular points their application always gave rise to fresh disputes. He decided finally certain points of construction and stated a case as to whether his decision was right. If it was wrong further liabilities might arise according to the view taken by the Court, and the award continued: "If either or both points are wrongly decided the matter is to be remitted to us to give effect to the true construction of the contract in our interim and final awards." Objection was taken that no appeal lay from the decision of the Court on this case, and Collins M.R. and Farwell L.J., stating the distinction was rather a fine one, held that as the umpire had said the case was to go back to him, the case was under s. 19: They do not appear to have considered the bearing of *Shubrook* v. *Tufnell* (1) in their decision.

I remain of the opinion that my decision in that case was

(1) 9 C. B. D. 621. (2) 95 L. T. 769.

a final decision (as it was stated to be and was certainly intended to be) and not an interlocutory one. But in the present case the arbitrator certainly does not retain control of the case. He "desires," not "directs," the matter to be remitted to him if he is wrong, which is the course the Court would usually take under s. 10 of the Act, if he did make a final award in the form of a special case, and gave no direction or expressed no desire as to what was to happen if his decision was erroneous. Finding two conflicting decisions of the Court of Appeal, I think I am at liberty to take my own view, which is that where the arbitrator expresses his final opinion in the form of a special case, he need not work out all the possible results which may follow from the possible other views the Court may take. If he is stating his final view, as distinguished from an interlocutory request for an opinion to guide him in forming his final view, I think he is stating the case under s. 7 and not under s. 19 of the Act. Arbitrators would however be well advised to state in their award for the consideration of the Court under which section they intend to act. The point in the present case has no merits, for if it succeeds the case must go back to the arbitrator to make a final award; and, if in that he states that he followed the opinion of the Court, all the appeals would follow which the objection intends to avoid. The respondents however desire the point to be taken; in my opinion it fails and they should pay the costs occasioned by taking it, and the appeal must proceed.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Hill, Dickinson & Co., Liverpool.*

W. H. G.

C. A.
1920
July 29.

[IN THE COURT OF APPEAL.]

LONDON GENERAL INSURANCE COMPANY *v.* GENERAL MARINE UNDERWRITERS' ASSOCIATION.

Insurance—Marine—Concealment of material Fact by Assured—Means of Knowledge of Assured and Underwriter—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 6, *sub-s.* 1 ; 18, *sub-ss.* 1, 3 ; 19.

On September 25, 1918, the plaintiffs effected with the defendants a policy of reinsurance upon the cargo of the steamship *Vigo*, "lost or not lost," which the plaintiffs had themselves previously insured. On the night of September 24 it was known at Lloyd's that part of the cargo had been destroyed by fire on board the *Vigo*. The fact was posted on the casualty board at Lloyd's in the morning of September 25, and a casualty slip containing the information was at the same time sent by Lloyd's to their subscribers, including the plaintiffs. At 10 o'clock on September 25 the plaintiffs instructed their brokers to effect the reinsurance policy at Lloyd's. They did it at 4 o'clock on the same afternoon. The plaintiffs, although they received the casualty slip, did not read it, and did not, in fact, know of the casualty. The defendants when they wrote the risk were equally ignorant of it. In an action upon the policy :—

Held, that the defendants were entitled to judgment on the ground of non-disclosure of a material circumstance. The plaintiffs ought in the ordinary course of business to have known of the casualty in time to recall their instructions to their brokers to effect the reinsurance. They had no right to neglect the casualty slips in a case where they were already on a risk on the ship. The defendants, on the other hand, if they had looked at the slips, could not be expected to have always present to their minds information about a vessel which at the time they got the information would have no interest for them at all.

Decision of Bailhache J. affirmed.

Appeal by the plaintiffs from a decision of Bailhache J. upon a claim on a reinsurance policy effected by the plaintiffs with the defendants on cargo carried by the steamship *Vigo* "lost or not lost" on a voyage from Italy to the United Kingdom. The defence to the action was concealment of a material circumstance at the time when the policy was effected—namely, that part of the cargo had been destroyed by fire.

The fire on the *Vigo* was known at Lloyd's on the night of September 24, 1918. It was posted on the casualty board

by 10 o'clock on the morning of September 25. A casualty slip containing that and other information was sent by Lloyd's to their subscribing underwriters, including the plaintiffs, at or about the same time. According to the established practice at Lloyd's these slips are made and sent out as occasion requires during the day. A daily register or index of information is published and issued by Lloyd's, but only contains information received not later than 8 o'clock on the previous evening. At or about 10 o'clock on the morning of September 25 the plaintiffs' brokers were instructed to effect the reinsurance policy at Lloyd's. They did it at about 4 o'clock that same afternoon. The plaintiffs, although they received the casualty slip, did not read it, and did not in fact know of the casualty until some two days later. The defendants, when they wrote the risk, were in the same state of ignorance.

By ss. 18 and 19 of the Marine Insurance Act, 1906, it is the duty of the assured to disclose to the insurer every material circumstance known to him, and he is deemed to know every circumstance which in the ordinary course of business ought to be known by him; and when the insurance is effected for the assured by an agent the agent must disclose to the insurer: (*a*) every material circumstance which in the ordinary course of business ought to be known by or to have been communicated to him; and (*b*) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent; but the assured is not bound to disclose any circumstance known or presumed to be known to the insurer, who is presumed to know matters of common notoriety or knowledge, nor matters which an insurer, in the ordinary course of his business as such, ought to know.

The plaintiffs' methods of business were as follows:—

Their head office and their marine insurance office were in separate buildings. It was the custom of the marine insurance office to send daily borderaux to the head office, showing the result of the day's work. These were examined, and if they showed that the plaintiffs had a heavier

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line upon a risk than they cared to carry, the insurance office was instructed to reinsure. It appeared that the plaintiffs had a limit of 1000*l.* on any one line. They had automatic reinsurance treaties with other companies, and if any of them were available they reinsured under one or more of those treaties. If none were available, as happened in this case, they reinsured, as was done here, in the ordinary way through brokers at Lloyd's. The marine insurance office had three departments—for underwriting, for claims, and for reinsurance respectively. Instructions to reinsure were given direct by the head office to the reinsurance department which was at the time under the charge of a Miss Stephens, acting when necessary under a Mr. Diaz, who was the brother and deputy of the plaintiffs' underwriter. The casualty slips were delivered to the underwriters' room. Owing to pressure of business the underwriters seldom or never looked at them. They were put into a drawer and from time to time during the day taken to the claims department. The primary object of the slips was to give underwriters the latest available information in advance about risks that might be shown to them during the day.

The plaintiffs contended that because their reinsurance department did not see the casualty slip in question and did not know its contents therefore the plaintiffs did not know, and could not be deemed to know of the fire.

The defendants contended that the plaintiffs had failed to disclose to the defendants the material circumstance that before the contract of reinsurance was concluded the loss in respect of which the defendants were sued had already been sustained, and that notice thereof had already been posted at Lloyd's; and that this was a material circumstance which was known or ought in the ordinary course of business to have been known to the plaintiffs or their agents by whom the reinsurance was effected. Bailhache J. held that the fire was a circumstance which the plaintiffs ought to have disclosed had they known it, and that it was impossible successfully to contend that it need not have been disclosed by the assured, because the underwriters might have

found it out for themselves by looking at the casualty board or the casualty slips. Brokers did not receive the casualty slips and did not as a rule consult the casualty board before showing a risk in the room. The casualty slip was notice of the fire on the *Vigo* to the plaintiffs, and they must be deemed to have known of it. An assured neglected the information given in the slips at his peril. The learned judge accordingly gave judgment for the defendants.

The plaintiffs appealed.

Douglas Hogg K.C. and *Jowitt* for the appellants. There has been no concealment by the appellants of any material circumstance. There is no suggestion of bad faith. There is nothing to show that in the ordinary course of their business the appellants ought to have known the particular fact at the material time. Nobody who was responsible for the reinsurance had in fact any knowledge of the casualty. Practically the parties in these cases are twelve hours behind in the knowledge of casualties, and in the ordinary course of the appellants' business they ought not in this case to be affected with such knowledge. At all events if the appellants ought to have known of the casualty the respondents ought equally to have known it, and the appellants were not, therefore, bound to communicate it to them.

Stuart Bevan K.C. and *Claughton Scott* for the respondents. There was ample evidence on which the learned judge could find that the casualty ought to have been known to the appellants. There was therefore concealment of a material circumstance. The underwriters are not to be presumed to have had knowledge of all the contents of the casualty notices particularly where they were not previously interested in the risk which they were reinsuring: *Morrison* v. *Universal Marine Insurance Co.* (1) There it was held that the insurance broker of the assured was not entitled to assume a knowledge by the underwriters of the contents of Lloyd's List.

Jowitt in reply.

(1) (1872) L. R. 8 Ex. 40.

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July 30. LORD STERNDALE M.R. The plaintiffs had a line upon the cargo of a vessel called the *Vigo*, and on September 24, 1918, they wished to effect a reinsurance. The *Vigo*, in fact, suffered a casualty, some of her cargo took fire on the evening of that very day. I do not know at what time the casualty occurred; at any rate the information came to Lloyd's at 11 o'clock on the night of the 24th, and on the morning of the 25th Lloyd's sent out casualty slips to their subscribers amongst whom were the plaintiffs; at least the slips were sent to the plaintiffs in this sense that they were one of a number of firms who apparently employed a Mr. Maurice Diaz as their underwriter. Mr. Diaz carried on business as underwriter at the office of the National Benefit Insurance Co., Ld. There he as underwriter acted for the plaintiffs and for a number of other companies, and I think he must be considered for the purposes of this case as the underwriter of the plaintiffs carrying on business at that place. In the place where Mr. Diaz carried on business there was a marine department, a claims department, and a reinsurance department, all forming parts of the underwriting department. A lady, Miss Stephens, was in charge of the reinsurance department, apparently under Mr. Diaz and his assistant, his brother Mr. Leon Diaz. She was not in the same room, the underwriting room; her room was upstairs on the fourth floor, but it was all one underwriting department divided into sections, and the way the business was carried on was this: when the plaintiffs found they had a bigger line than they thought advisable on any risk they informed their underwriting department and sent instructions to Miss Stephens who, if possible, effected the reinsurance with some of the associated companies with whom the plaintiffs had treaties of reinsurance, and if that was not possible, she sent out instructions to the broker to effect the reinsurance at Lloyd's or outside. On September 24 she received instructions to reinsure a portion of the line on the *Vigo*. She prepared instructions, and dated them on September 25, because they were too late to be put in operation on the

evening of the 24th. On the morning of September 25 she handed these to the broker's clerk who called to see if there was any business. The broker received the instructions but was not able to effect the reinsurance until somewhere about 4 o'clock in the afternoon. It is not quite clear at what time the casualty list came from Lloyd's to the office. Probably it was between 10 o'clock and 10.30. When they were received nobody took any notice of them at all. There was great pressure of business, and it may be that things were not at the time working quite smoothly. The casualty slips were handed in to the underwriting department, and the underwriter put them into his drawer, and at the end of the day they went to the claims department. That department should have given the reinsurance department information of any matter on the casualty slips. But it seems clear that nothing of the kind was done, and really they were entirely neglected—it may be owing to the pressure of business. The evidence of the defendants is that what was done with the casualty slips in their case was that they were looked through by a lady clerk and if there was anything in them which concerned a risk upon which the defendants were that was brought to the attention of some one in authority. I think it must be taken that the defendants were not upon the risk when the casualty slip relating to the cargo in the *Vigo* came in. The defendants also said that in effecting an insurance they would investigate the slips or any other available information including the daily list of casualties of the day before compiled and sent out by Lloyd's, but that in proposing a reinsurance they did not look at any of these materials. Those are the circumstances under which the question arises

Ought the plaintiffs in the ordinary course of business to have known of this casualty, and to have known of it at a time when they could have recalled their instructions to their broker or have effected the reinsurance free of the casualty? Bailhache J. has found that they ought, on this ground, that they had no right to neglect the casualty slips which they admitted to be sent for the purpose of giving them

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information, and certainly they ought not to have neglected them in a case where they were on a risk, as they were on the *Vigo*. Their evidence was, that they never did anything to make use of the slips at all. He has held that that was not right, and that they ought as far as business would have permitted it to have availed themselves of the information that was given to them by Lloyd's. I do not see my way to differ from him. If it were a question of their having done their best, so far as the pressure of business would allow, to make themselves acquainted with the casualty slips, and of their not being able to do so in time to stop the broker's instructions, I think it might have been difficult to deal with such a case, but there is no such case before us. They never did anything at all and I do not see my way to differ from the learned judge when he comes to the conclusion that if they had taken steps to examine these casualty slips they might and would have found out this casualty in time to communicate with their brokers before 4 o'clock when the reinsurance was effected.

There remains another point. It is said that if that is true of the plaintiffs it is equally true of the defendants, and as they ought to have known in the course of their business the contents of these casualty slips it is a circumstance which the plaintiffs were not bound to communicate to them. The learned judge has taken the view—again I do not see my way to differ from it—that the defendants were not upon the risk in the *Vigo*. I think that is right, and he has then taken this point, that the defendants, supposing they had these slips could not be expected to have always present to their minds information which at the time they got it would have no interest for them at all. In fact he has dealt with it, I think, upon the principle of *Bates* v *Hewitt* (1) where the plaintiff had not informed the insurer that the *Georgia* had been a Confederate cruiser and was, therefore, not insurable, and it was contended that he need not communicate that fact because the defendant had the same means of knowledge. The defendant in fact admitted that he had known that at

(1) (1867) L. R. 2 Q. B. 595.

one time the *Georgia* was a Confederate cruiser, but it was not present to his mind when he took the risk, and the Court held that an insurer was not to be expected always to carry in his mind information which had no interest for him at the time that he got it. That seems to me to be the principle on which the learned judge acted, and I do not see my way to differ from him. The defendants had no interest in the *Vigo* at all. Their clerk who looked at the slips would not therefore have communicated to them the information about her. There was no reason therefore why they should have known of this information. For these reasons, although it is a difficult case, I do not see my way to differ from Bailhache J., and I think the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. I desire to mention one point which has influenced me in the conclusion to which I have arrived and that is with regard to these casualty slips which are intended to tell the persons concerned what casualties have happened. I think the one with regard to the *Vigo* must be taken to have arrived at the office in which the plaintiffs' underwriting business is carried on in the early morning. It was a casualty that happened overnight, and it appears as I understand very near the end of the list in the casualty book for that day, and I think one may infer it arrived early in the morning. Now we know from the evidence what is done. The slips are taken to the underwriting department, where they are looked at by the manager as opportunity occurs, and afterwards they are sent to the claims department. The manager of the underwriting department says he did look at them from time to time and the only reason apparently why they were not looked at on this day was that owing to pressure of business he had not time to do so. It seems to me that is not enough. The ship was on this list; they were contemplating reinsuring it and there was information material to the risk actually in their possession, and it is only because they were either too busy or too careless to look at it that they did not obtain the material information. It seems to me the circumstances

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Warrington L.J.

are such that we cannot possibly differ from Bailhache J. in holding that this was information which under the Act of Parliament must be taken to be a matter of which they ought to have had knowledge. With regard to the other point it seems to me the defendants were in a very different position. It is true the casualty list went to their office also, but they were not interested in this risk and they had no reason for referring to the slip. I do not believe for a moment that if they had been already insurers of that risk they would have accepted the reinsurance without ascertaining that fact, and if they were not interested in it then even if they had looked at the casualty list it would not necessarily have conveyed anything to their minds the knowledge of which must continue when at a late hour in the day the proposal for this reinsurance was put forward. I think Bailhache J. on this point also was right, and that the defendants cannot be presumed to have had knowledge of this casualty merely because they had the opportunity of ascertaining it, not merely the opportunity of ascertaining it but the opportunity of its being carried in the head of the man whose duty it was to know it. I am, therefore, of opinion that the decision of Bailhache J. must be affirmed.

YOUNGER L.J. I am of the same opinion. It appears to me that the manner in which the plaintiffs' underwriting department was conducted was such that information as to the contents of the casualty lists, except in the most exceptional circumstances, would never "timeously," as the Scots say, come to the knowledge of the reinsurance department; and if this Court were to differ from the conclusion at which the learned judge has arrived I cannot but think that, in a case less meritorious than this, it might be possible for persons in the position of the plaintiffs to establish liability against their insurers by closing their eyes and ears to information which it was their duty to be cognisant of. With reference to the statement that the defendants when they are accepting risks are more careful to examine the daily lists than when they are

themselves offering risks, the distinction between the two cases I think is this, that neglect on the part of persons in the position of the defendants to refer to the daily list when accepting risk is neglect to their own undoing, but neglect when they are offering risk for insurance to make some disclosure is to the undoing of the insurer and injures him. Therefore, I think the two cases should be regarded from a different point of view, and so regarding them it seems to me that the duty of the defendants when accepting risk from an assured in relation to information with regard to a particular vessel or property with which they have had previously no concern is certainly not so intimate in the ordinary course of business as is their duty when effecting a reinsurance of property already at risk. For these reasons I think the learned judge came to a right conclusion and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants : *Coburn & Co.*
Solicitors for respondents : *Thomas Cooper & Co.*

G. A. S.

C. A.
1920
Oct. 18.

[IN THE COURT OF APPEAL.]

POSTMASTER-GENERAL *v.* BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY.

Electric Tramway—Escape of Electricity—Injury to Telegraph Lines of Postmaster-General—Provisions for his Protection in special Act of Tramway Company—Construction of—Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 *Vict. c. cxlvii.*), *s.* 65, *sub-ss.* 1, 2.

By s. 65, sub-s. 1, of the Blackpool and Tramroad Act, 1896, it is provided that in the event of the company's tramroad being worked by electricity the company shall work their undertaking "with due regard" to the telegraphic lines of the Postmaster-General, and "shall use every reasonable means" in the working of their undertaking to prevent injurious affection of such lines.

By sub-s. 2: "If any telegraphic line of the Postmaster-General is injuriously affected . . . . by the working of the undertaking of the company, the company shall pay the expense of all such alterations in the telegraphic lines of the Postmaster-General as may be necessary to remedy such injurious affection."

In 1898 the defendants under the powers conferred by the said Act constructed an electric tramway along certain public roads. In 1914 the Postmaster-General laid underground along the same roads a telephone cable, which at one point came within seven feet of the defendants' lines. In 1916 a breakdown occurred in the cable in consequence of its being injuriously affected by an escape of electricity from the defendants' lines. In an action by the Postmaster-General under s. 65, sub-s. 2, to recover the expenses he had been put to the Divisional Court held that the liability of the defendants, under that sub-section, which was to be read independently of sub-s. 1, was an absolute liability, and that neither the fact that the defendants had used every reasonable means in the working of their undertaking to prevent injurious affection to the plaintiff's cable, nor that the plaintiff by laying his cable so near to the defendants' lines had courted the injury, afforded any defence. On appeal:—

Held (affirming on this point the decision of the Divisional Court), that sub-s. 2 of s. 65 was an independent sub-section and in no way dependent upon sub-s. 1.

Held, also, that if it was proved that the injurious affection of the Postmaster-General's cable was caused by the construction or working of the defendants' undertaking it would be no answer to a claim by the Postmaster-General for the defendants to prove that he had been guilty of want of reasonable care and skill in selecting the place in which to lay his cable.

Held, further, that if the defendants could show that the construction or working of their undertaking did not injuriously affect the cable but that the injurious affection was entirely due to the Act of the Postmaster-General, then in all probability sub-s. 2 would not apply.

But, *held*, that in order to raise that point it was necessary that there should be a finding of fact by the county court judge before whom the matter originally came of negligence on the part of the Postmaster-General.

Held, therefore, that there being no such finding, it was not competent either to the Divisional Court or to the Court of Appeal to entertain an appeal on that ground, and that the appeal must therefore be dismissed.

APPEAL from a decision of the Divisional Court (Warrington and Scrutton L.JJ. sitting as additional judges of the King's Bench Division (1)) reversing a decision of the judge of the Blackpool County Court.

In 1898 the defendants under the powers conferred by the Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 Vict. c. cxlvii.), constructed an electric tramway between Blackpool and Fleetwood. The tramway ran, in part of its course, on public roads, and in other parts alongside the public roads, just outside the boundary fence and on private land specially acquired for the purpose. In 1914 the plaintiff, the Postmaster-General, caused to be laid underground in the roadway along the same road as that followed by the defendants' tramway a cable containing telephone wires. At one point the cable was laid within seven feet of the defendants' electric lines. In June, 1916, a breakdown of the plaintiff's cable and an interruption of telephonic communication occurred in consequence of the lead piping of the cable being injuriously affected by electrolytic corrosion due to escape of electric current from the defendants' lines. The plaintiff was thereby put to expense in altering his cable, and to recover the amount of that expense, 16*l.* 18*s.*, he brought this action in the county court.

By s. 66 of the defendants' special Act above mentioned they were authorized to use electric power for the working of their tramway only subject to the condition of their complying with certain regulations of the Board of Trade, but the county court judge found that those regulations had been complied with. By s. 65 of the same Act provision was made for the protection of the plaintiff: "In the event of

(1) [1920] 1 K. B. 436.

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the tramroad or tramway of the company being worked by electricity the following provisions shall have effect" :—

Sub-s. 1: "The company shall construct their electric lines and other works of all descriptions and shall work their undertaking in all respects with due regard to the telegraphic lines from time to time used or intended to be used by Her Majesty's Postmaster-General and the currents in such telegraphic lines, and shall use every reasonable means in the construction of their electric lines and other works of all descriptions and the working of their undertaking to prevent injurious affection whether by induction or otherwise to such telegraphic lines or the currents therein." By sub-s. 2 of that section: "If any telegraphic line of the Postmaster-General is injuriously affected by the construction by the company of their electric lines and works or by the working of the undertaking of the company the company shall pay the expense of all such alterations in the telegraphic lines of the Postmaster-General as may be necessary to remedy such injurious affection." And by sub-s. 6: "For the purposes of this section a telegraphic line of the Postmaster-General shall be deemed to be injuriously affected by an act or work if telegraphic communication by means of such line is, whether through induction or otherwise, in any manner affected by such act or work or by any use made of such work."

The defendants, as the county court judge found, had used all reasonable means in the construction of their electric line and the working of their undertaking to prevent injurious affection of the plaintiff's cable, and particularly had made monthly tests for the purpose of detecting excessive leakage of electric current and those tests showed satisfactory results. Subsequently to the breakdown of the plaintiff's cable the plaintiff, at the defendants' invitation, bonded his cable to their track, whereupon further electrolytic corrosion practically ceased. The action was framed under s. 65, sub-s. 2.

The county court judge held that sub-s. 2 of s. 65 must be read along with sub-s. 1, and that in the absence of

proof that the defendants had failed to take all reasonable means to prevent the injury the plaintiff could not succeed. He accordingly gave judgment for the defendants. On appeal the Divisional Court reversed the decision of the county court judge. They held, (1.) that the liability of the defendants, under sub-s. 2, which was to be read independently of sub-s. 1, was an absolute liability, and that neither the fact that the defendants had used every reasonable means in the working of their undertaking to prevent injurious affection of the plaintiff's cable, nor that the plaintiff, by laying his cable so near to the defendants' lines had courted the injury, afforded any defence.

The defendants appealed. The appeal was heard on October 18, 1920.

Wingate Saul K.C., *Barrington-Ward K.C.* and *Milner Helme* for the appellants repeated the arguments used by them in the Divisional Court.

Sir Ernest Pollock S.-G., *Ross-Brown K.C.* and *Branson* for the respondent were not called upon.

LORD STERNDALE M.R. I think this appeal fails. It is unnecessary to state the facts at any length, or to do more than refer to the statement of them by the learned judges of the Divisional Court.

I think that the learned counsel for the appellants were quite right in admitting both in this Court and in the Court below that they could not uphold the judgment of the learned county court judge on the grounds on which he based it. Those grounds were shortly that the provisions of sub-s. 1 of s. 65 of the Blackpool and Fleetwood Tramroad Act should be read with the provisions of sub-s. 2, and that the latter sub-section only had effect if it were proved that there had been a breach by the company of the obligations imposed upon them by sub-s. 1. I think that view is quite untenable. Sub-s. 2 is an independent sub-section, and does not depend upon the provisions of sub-s. 1 at all. Considering that this appeal is brought from a decision of two other members of

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Lord Sterndale M.R.

this Court, although sitting as a Divisional Court, I do not propose to give any lengthy or detailed statement of the reasons which have actuated me in coming to the decision at which I have arrived. I think it better not to do so. All I will say on the point which has been argued before us is that if it be shown that the cable of the Postmaster-General's cable was injuriously affected by the construction or working of the undertaking of the company, it would I think be no answer to a claim under s. 65, sub-s. 2, for the company to prove that the Postmaster-General had been guilty of want of reasonable care and skill in selecting the place in which to lay his cable.

What might be the effect in the very extreme case put in argument of the construction and working of the undertaking of the company having nothing to do with the injurious affection of the cable is another question altogether, because if it could be proved that the construction and working of the undertaking of the company did not injuriously affect the cable, but that the injurious affection of the cable was entirely due to the act of the Postmaster-General, then in all probability the sub-section might not apply. But, as I say, it is not, in my opinion, any answer to a claim by the Postmaster-General for the company simply to show that the position of the cable was, if it were the fact, selected by him without an exercise of reasonable care and skill.

That is all I wish to say with regard to the point that was argued before us; except to add that I have very grave doubts whether that point was open, either in the Divisional Court or in this Court, and for this reason: that, in order to take it, it would be necessary that there should be a finding by the county court judge of negligence on the part of the Postmaster-General. There was some evidence before him that it was not reasonably careful on his part to lay the cable so near to the tramway lines as he did. On the other hand there were many other circumstances to be considered which might have qualified that evidence, and would have qualified it very materially. There was evidence, for instance, that a compliance by the company with reg. 62 of the regulations

of the Board of Trade might have prevented this occurrence, and it might be assumed, in the absence of knowledge to the contrary, that there had been such compliance. The evidence as to whether or not there had been such compliance was doubtful, and there was also the evidence of the manager of the company that it was apparently not safe to put cables within seven feet of the line, and the result of the case shows it. But that evidence rather points to it being a question whether it was a want of reasonable care and skill to have laid the cable within that distance. I express no opinion as to what would be the result of that evidence, but what I desire to point out is, that in order to deal with the question, whether the negligence of the Postmaster-General would be an answer or not, there must be a finding of negligence on his part.

If the learned county court judge had been asked to make such a finding and had neglected to do so, it might have been right to send the case down for a new trial. But it is perfectly obvious from his note, and indeed we are told by the learned counsel who was before the learned county court judge, that he did not directly ask him to come to such a conclusion. In the absence of such a finding, in my opinion it is not competent for us to deal with the matter.

We cannot decide without that finding of fact; we cannot come to that finding of fact ourselves, and as I say, I have for these reasons the gravest doubts whether this point was open either before the Divisional Court or before us.

On these grounds I think the appeal should be dismissed.

ATKIN L.J. I agree. It is common ground that the construction put upon s. 65, sub-s. 2, by the learned county court judge cannot be supported. It was not sought to be supported in the Court below, and it has not been sought to be supported in this Court.

If that is so, it leaves sub-s. 2 to be construed according to its plain words, and apparently that would entitle the plaintiff to recover in this action. But it is said by the appellants that the true view of the case is that the telegraphic cable

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POST-MASTER-GENERAL v. BLACKPOOL AND FLEETWOOD TRAMROAD CO.

Atkin L.J.

of the Postmaster-General was not injuriously affected by the construction or working of the undertaking of the tramway company, but was injuriously affected by reason of the negligent act or omission of the Postmaster-General himself, in laying his cable at such a distance from the lines of the tramway company and in such a manner that the cable must necessarily have been affected by the return current escaping to the cable, and then escaping back again at the particular point from the cable to the tramway company's lines.

Now it appears to me that that was a point that ought to have been taken in the county court before it could be entertained in this Court. It is a condition precedent to the entertaining of a point on appeal from the county court by the appellate Court, which has only power to entertain an appeal on a point of law, that the point should be taken in the Court below. To begin with, there is not a trace of that point in the judgment of the learned county court judge. I agree that that is not conclusive, but I certainly think that it is a matter to which considerable weight is to be attached, because it is very difficult to suppose that the learned county court judge would not have directed his attention to the point, if it really had been taken before him; but more than that, there is, in his notes, no evidence of the point having been really made, and that prevents us, and with all respect should have prevented the Divisional Court, from entertaining the appeal on that point.

If the point had been taken, it is one that appears to me to require a very careful and elaborate examination of the facts, and certainly it would have required that further materials should be put before the learned county court judge by the appellants, if they had wished to succeed on it, than they appear to have put before him. Certainly it would be quite impossible for this Court to come to a conclusion on a really difficult question of fact, without having any real materials on which they could form an opinion as to what were the conditions under which this cable was originally laid, what was the margin of safety, and what was the probability of safety.

If, in fact, the tramway company had maintained the conditions laid down by the Board of Trade Regulations as to preventing more than a certain minimum of leakage, there is some substantial ground for supposing that this damage would not have occurred at all. There is a finding of the learned county court judge in that respect (not addressed to this particular point) which however I find it a little difficult to follow.

The result is that the failure to take the point is sufficient ground for disposing of this appeal.

I think it would be most unfortunate if the parties in this case were to find themselves in the House of Lords trying to determine a point of law when it might turn out that that point of law was not in fact open to them. I think it is therefore much better to make it plain at the earliest possible opportunity that this point was not open to them.

I therefore reserve any opinion upon the question that was before the Divisional Court. I can appreciate that it might well be said, as a mere matter of construction, that when in any case the plaintiff, the Postmaster-General, has to show that his cable was injuriously affected by the working of the undertaking of the company, it is possible—I do not say more than that—that he may fail to do so, if it is proved that he did something which necessarily led to the result of his line being destroyed by leakage from the existing current, which he, so to speak, directed on to his own cable. That is a matter as to which, to my mind, it is unnecessary for us to express an opinion. I agree that the appeal should be dismissed.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Nicholson, Graham & Jones, for J. R. Gaulter, Fleetwood.*

Solicitor for respondent: *The Solicitor to the Post Office.*

W. I. C.

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July 23, 29, 30.

HARRISONS, LIMITED *v.* SHIPPING CONTROLLER.

Shipping—Charterparty—Steamship requisitioned by Admiralty—Sailing under Convoy — Damage to Ship caused by Stranding — "Sea risk" — "Consequences of hostilities or warlike operations" — Liability of Admiralty.

In determining whether a vessel is engaged in a warlike operation, the dominant features of the ship and the dominant object of the voyage must be looked at.

The presence of a few soldiers aboard, whether wounded or unwounded, would not turn a merchantman into a transport or change an otherwise peaceful voyage into a warlike undertaking.

Passage in the judgment of Lord Atkinson in *Britain Steamship Co.* v *The King* (*The Petersham*) [1921] 1 A. C. 113 explained.

The steamship *Inkonka* was requisitioned by the Admiralty on the terms of the charterparty T. 99 which provided that the Admiralty were not to be held liable if the steamer should be injured by a sea risk, but that the Admiralty took the risk of "all consequences of hostilities or warlike operations." By the terms of the charterparty the *Inkonka* was bound to obey the orders of the Admiralty and its officers. She sailed under Admiralty orders from Salonica bound to Taranto in Italy, having on board hospital stores for the British Government and a few British troops and officers. When proceeding towards Taranto she was navigating the war region, and was therefore sailing without lights, and was escorted by a British destroyer. She was ordered by the destroyer to follow a pilot escort which had come out of Taranto to escort the vessels into the port. She did so, although the master would not have attempted without the destroyer's orders to enter the port, and he only sought to do so in the darkness in reliance on the pilot escort. After following the pilot escort for upwards of half an hour the master of the *Inkonka* suddenly lost sight of the pilot escort's lights, and seeing a red light on his port bow immediately put his helm hard aport and almost immediately afterwards ran ashore and sustained damage. There was no negligence on the part of the master of the *Inkonka*:—

Held, that the Admiralty were not liable for the damage to the *Inkonka*, inasmuch as although she was stranded whilst being navigated under war conditions, the damage to her did not arise in consequence of warlike operations.

Green (*The Matiana*) v. *British India Steam Navigation Co.* [1921] 1 A. C. 104 followed.

AWARD in the form of a special case stated by an arbitrator.

By an agreement in writing dated August 17, 1918, between Messrs. Harrisons, Ld., as owners of the steamship *Inkonka* and the Shipping Controller, it was agreed to submit to the

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arbitrator a dispute which had arisen between them as to whether the Shipping Controller was liable to the owners in respect of damage suffered by the *Inkonka* in consequence of her stranding on Capo St. Vito in Italy on November 17, 1917. The *Inkonka* was at all material times under requisition to the Admiralty under the terms of the charterparty, Form T. 99, which contained (inter alia) the following clauses: Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive clauses:—

"Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." By the terms of the charterparty the master was bound to obey the orders of the Admiralty and its officers.

The following statement of the facts is taken from the judgment of the learned judge: On November 14, 1917, the *Inkonka* sailed under Admiralty orders from Salonica bound to Taranto in Italy. She was laden with hospital stores for the British Government. She had on board a few British troops and officers. Before sailing she was furnished with a printed book (D. P. 20) dated June, 1917, which purported to describe the lights and entrance to the port of Taranto. This book (owing to recent changes) was incorrect, and failed to give true information as to the leading lights in and about Taranto. On November 15, 1917, the *Inkonka* passed through the Corinth Canal and proceeded towards Taranto. She was navigating the war region, and therefore sailed without lights. She was escorted by a destroyer, H.M.S. *Pincher*. The weather was stormy. The

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master trusted to dead reckoning, but on November 17, at about 6 o'clock in the evening, he sighted three stars, and got a more accurate position. He then put his course N. ¾ E. At 9 P.M. he signalled H.M.S. *Pincher* and said that he ought to have run his distance, and should stop then if no lights were seen. At about 10 P.M. no shore lights were seen, but he was ordered by H.M.S. *Pincher* to follow a pilot escort, which had come out of Taranto to escort the vessels into the port, and which exhibited two violet lights astern. The master thought that he was about ten miles from Capo St. Vito (which guards the southern entrance to Taranto), which he thought was bearing north-east. This view was erroneous; but he had no light to guide him. The shore leading and other lights were not lighted in war time, unless ships were entering and then signalled. The night was dark and stormy. He would not have attempted to enter the port if he had not been ordered to do so by H.M.S. *Pincher*, whose orders he was bound, under severe penalties, to obey. In view of those compelling orders, he relied, and could only rely, upon the pilot escort; and he proceeded to follow her about two cables distant. H.M.S. *Pincher* followed about one and a half cables behind the *Inkonka*. Another ship's light had been sighted by the *Inkonka*, and in fact, though the master did not know it, it was the light of H.M.S. *Isonzo*, which was also approaching Taranto, and which proceeded to follow astern of H.M.S. *Pincher*. At 10.30 certain shore lights appeared. In fact (though the master did not know it) these shore lights were the leading lights of the defended port of Taranto, and had been turned on in response to signals from H.M.S. *Isonzo*. The master could not identify these lights by reason of the defective information in book D. P. 20. He therefore continued to follow the pilot escort ahead, till he suddenly lost sight of her lights, and could hear no whistle or signal from her or make out her hull. Two minutes after he had lost sight of the pilot escort, a red light suddenly flashed on the port bow of the *Inkonka*, the master of which was still on the same course as when he had been actually seeing and following the pilot escort lights. The master, seeing the

red light on his port bow, immediately put his helm hard aport, and the *Inkonka* swung to starboard, and almost immediately afterwards ran ashore off Capo St. Vito; the red light being in fact the light on Capo St. Vito, though the book D. P. 20 did not indicate any such light. The master ported away from the light hoping to swing round away from it, but in fact there was no room to turn, and porting brought him right on the rocks. The master immediately signalled to H.M.S. *Pincher* that he was ashore, and H.M.S. *Pincher* got clear. H.M.S. *Isonzo* also picked up a pilot escort and, like H.M.S. *Pincher*, proceeded into port. It was not clear whether their pilot escort was the same pilot escort as that which had been leading the *Inkonka*.

The arbitrator, in his findings of the facts in his award, completely exonerates the master of the *Inkonka* from any negligence.

He finds that the master only sought to enter the port in the darkness under the orders of H.M.S. *Pincher*, and that he did so in reliance on the pilot escort. If the shore lights had been burning all the time (as they would have been but for war conditions), and if they had been as shown in the book D. P. 20, the master could have ascertained his position; but, in fact, he was not navigating on any accurate view of his position, but was simply following, under orders, the pilot escort. If the pilot escort had shown more efficient lights, or if the night had been sufficiently clear to make out her hull, there is no reason to think that the *Inkonka* would not have reached the port of Taranto safely. No explanation was given as to why the pilot's lights disappeared from view; and it was not shown that any military reason existed to justify the insufficiency of the lights having regard to the darkness and low visibility of the night."

By para. 7 of the award if and so far as it was a question of fact the arbitrator found that the stranding of the *Inkonka* was caused by the inefficient lights of the pilot escort, and that if the lights had been adequate having regard to the low visibility of the night, there was no reason why the *Inkonka*

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should not have safely followed the escort into Taranto or should have been stranded. By para. 8 he accordingly found (if and in so far as it was a question of fact), and he decided (if and in so far as it was a question of law, and subject in that case to the opinion of the Court) that the stranding was not a consequence of hostilities or warlike operations within clause 19 of T. 99.

Subject to the opinion of the Court on any question of law the arbitrator awarded that the Shipping Controller was not liable in respect of the matters in question to the owners. If the Court should be of opinion the award was not erroneous in law it was to stand; but if the Court was of opinion that the award was erroneous in law it was to be set aside and instead thereof it was to be that the Shipping Controller was liable to the owners in respect of the matters in question, the parties not having submitted to the arbitrator any question of amount or any question save that of liability.

Sir J. Simon K.C. and *Neilson K.C.* for the shipowners. The Admiralty are liable to the shipowners for the damage to the *Inkonka* caused by her stranding.

The vessel was engaged in a "warlike operation" within the meaning of clause 19 of the charterparty, and was not incurring a "sea risk" within the meaning of clause 18. She was proceeding from Salonica to Taranto by direction of the British Admiralty with troops and hospital stores for the British Government, she was navigating the war region under the escort of a destroyer of the British Navy, the orders of whose commander she was bound to obey, and as it was dark she was sailing without lights in accordance with Admiralty regulations.

The stranding of the vessel was a "consequence" of the warlike operation in which she was engaged within the meaning of clause 19. The warlike operation was the proximate cause of her running ashore. This, no doubt, need not necessarily have been so. The fact that the vessel was engaged in a warlike operation did not of itself deprive her of all power of independent navigation, and if in the circumstances she

had of her own choice made the attempt to enter the port of Taranto for the purpose of avoiding some sea risk, her own act, intervening between the warlike operation in which she was engaged and her running ashore, would have been the proximate cause of her loss. Her attempt to enter the port was made, however, not of her own choice, but in compliance with the express order of the naval commander which was given to her because of the war service which she was rendering and which she was bound passively to obey. That being so, her attempt to enter the port was part of the warlike operation in which she was engaged. It follows that that warlike operation was the proximate and immediate cause of her running ashore, and therefore that her stranding was the "consequence" of the warlike operation within the meaning of the charterparty: *British and Foreign Steamship Co.* v. *The King.* (1) The fact that there was no room between the vessel's warlike operation and her mishap for any exercise of discretion by those on board of her or for any other intervening cause which could have prevented that operation from being the proximate cause of the mishap distinguishes this case from *Britain Steamship Co.* v. *The King* (*The Petersham*) (2) and *Green* (*The Matiana*) v. *British India Steam Navigation Co.* (3)

[The compulsory nature of the statutes and regulations referred to in the judgment of the learned judge was also relied upon.]

Raeburn K.C. (*Sir Gordon Hewart A.-G.* with him) for the Shipping Controller. The Admiralty are not liable for the loss of the *Inkonka.*

The vessel at the time of her stranding was not engaged in a "warlike operation" within the meaning of clause 19 of the charterparty, but was incurring a "sea risk" within the meaning of clause 18. The burden is upon the shipowners of proving that the vessel was engaged in a warlike operation and they have failed to discharge that burden. The vessel was employed in the commercial pursuit of transporting stores. She happened to have on board a few troops, but was not

(1) [1918] 2 K. B. 879. (2) [1921] 1 A. C. 100.
(3) [1921] 1 A. C. 104.

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evacuating troops from Salonica like the vessel in *British and Foreign Steamship Co.* v. *The King.* (1) She was engaged in an operation, but it was not of a warlike character.

Even if the vessel was engaged in a warlike operation, her stranding was not a "consequence" of that operation within the meaning of clause 19 of the charterparty. The proximate cause of her stranding was not the warlike operation in which she was engaged, but her own negligence. If those in charge of her had acted according to the dictates of prudent navigation, they would have expressed to the naval commander their unwillingness to attempt to enter the port of Taranto at night, and if they had done so he would not have enforced the order in question, but they negligently omitted to adopt that precaution. Further, if the vessel had followed the course set by the pilot boat she would have reached the port in safety, but owing to her own carelessness she failed to follow that course.

In *Green* (*The Matiana*) v. *British India Steam Navigation Co.* (2) it was held that the cause of the loss was not a "warlike operation" within the form of charterparty now in question and a fortiori ought that view to be taken here.

There is no distinction between the present case and the *Matiana Case.* (2) The mere fact that the *Matiana* was carrying a purely commercial cargo while the *Inkonka* had some troops and stores on board is not enough to distinguish the two cases in law. There is no finding by the arbitrator that the *Inkonka* was assisting in the evacuation of Salonica. The nature of the cargo alone is not a test as to whether the vessel was engaged in a warlike operation. The *Inkonka*, for the purpose of avoiding a war peril, took an increased marine risk—namely, the risk of stranding. Even if she was engaged in a warlike operation it was not the cause of the loss. It is impossible to hold that the fact that she carried troops, or the order of the commander of the *Pincher*, was the proximate cause of the *Inkonka* going aground. The stranding was not caused by the operation of a new peril but merely by an old peril—namely, a marine risk being increased.

(1) [1918] 2 K. B. 879. (2) [1921] 1 A. C. 104.

[*Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1); *Ard Coasters* v. *The King* (2); *Ionides* v. *Universal Marine Insurance Co.* (3); *Winspear* v. *Accident Insurance Co.* (4); *Lawrence* v. *Accidental Insurance Co.* (5); *Owners of S.S. Larchgrove* v. *The King* (6); *Richard de Larrinaga* v. *Admiralty Commissioners* (7); *British India Steam Navigation Co.* v. *Green* (8); and the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55, were also referred to.]

Neilson K.C. in reply. The stranding of the *Inkonka* was the consequence of a warlike operation. In the *Matiana Case* (9) Atkin L.J. said that almost any operation connected with the movement of troops was a warlike operation. There is great difficulty in reconciling the various decisions and dicta in the reported cases. In the present case the commander of the *Pincher* said in effect to the *Inkonka*: "Hold your course." In the *Matiana Case* (10) the order given to the *Matiana* was merely: "Set your course N. 51 W." It was not necessary for the *Matiana* to sail in a direct line. She had the power and right to go to whatever part of a broad road she liked, either along the middle of it or one side or the other. In the present case the helmsman had his direction as to the course he was to keep given to him and he was bound to keep on that course. There is no evidence that the pilot escort got safely into port. She too may have gone ashore.

July 30. The following judgment was read by

McCARDIE J. who, after stating the facts, continued: The question is whether, on the facts as I have stated them (apart from clauses 7 and 8), the stranding of the *Inkonka* was a consequence of hostilities or warlike operations. Inasmuch as the circumstances are stated by the arbitrator in full detail I conceive that his summarized findings in clauses 7 and 8 of the award are open to review.

The question becomes one of law immediately the full facts

(1) [1918] A. C. 350, 368.
(2) (1920) 36 Times L. R. 555.
(3) (1863) 14 C. B. (N. S.) 259.
(4) (1880) 6 Q. B. D. 42.
(5) (1881) 7 Q. B. D. 216.
(6) (1920) 36 Times L. R. 108.
(7) [1920] 3 K. B. 65.
(8) [1919] 1 K. B. 632.
(9) [1919] 2 K. B. 670, 695.
(10) [1921] 1 A. C. 104.

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appear and the master of the *Inkonka* has been exonerated from any negligence or breach of duty.

My task as a judge of first instance is embarrassing. The burden rests upon me of interpreting, as best I can, the body of decisions which bear upon the point, and of eliciting the true effect of the opinions in the House of Lords in the recent cases of *Britain Steamship Co.* v. *The King* (*The Petersham*) (1) and *Green* (*The Matiana*) v. *British India Steam Navigation Co.* (2) Those weighty opinions represent not only a conflict of view between majority and minority, but also an apparent difference of opinion on several points between the distinguished law Lords who formed the majority itself.

It seems clear from the opinion of all in the House of Lords in those cases that the words "warlike operations" are a broader phrase than the word "hostilities." The question therefore comes to this: "Was the stranding of the *Inkonka* a consequence of warlike operations?" No definition has yet been given of that phrase. If given, it might have solved many of the difficulties which arise. Illustrations have been offered with frequency, and it is, of course, less difficult to illustrate than to define. The embarrassment of definition springs, I conceive, from the breadth of the phrase "warlike operations." It is a complex phrase. It denotes and connotes an infinity of varying circumstances. Just as it is difficult to define the words "fraud" or "accident," so with the phrase "warlike operations." Even the most exhaustive definition could scarcely comprise the differing circumstances which may arise. The problem is further and strikingly complicated by the fact that the words have to be considered in connection with the full phrase "all consequences of hostilities or warlike operations." This word "consequences" introduces the ever-difficult question of causation as illustrated, for example, by *Becker, Gray & Co.* v. *London Assurance Corporation.* (3) Causation involves the notion of sequence, and this notion has not as yet been fully grappled with or exhaustively treated. It is a topic of profound juristic

(1) [1921] 1 A. C. 100. (2) [1921] 1 A. C. 104.
(3) [1918] A. C. 101.

complexity. The Courts cannot act as metaphysical analysts. They can only administer or state the law in practical language upon particular aggregates of circumstance. But in such a case as the present it is always well to remember the cogent words of Lord Sumner in *Becker, Gray & Co.* v. *London Assurance Corporation* (1): "Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the 'common-sense cause,' and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance." It is always of vital importance to remember that clause 19 in this charter follows and is subject to clause 18. Clause 18 saves the Admiralty from liability for ordinary marine risks and perils of the sea. Clause 19 deals with a wholly different set of risks—namely, those which spring from hostilities or warlike operations. In time of war marine risks exist as fully, and perhaps more fully, than in time of peace; and they are none the less marine risks because their details may be coloured or added to, or the danger enlarged, by the existence of wartime conditions. It seems proper to distinguish between war-time conditions of merchantman traffic and the actual occurrence of warlike operations. The imposition of regulations upon merchantmen, whether such regulations be slight or stringent, and whether they be general or specific, does not of itself seem to constitute a warlike operation. If it were otherwise, then it would follow that upon the outbreak of war all British merchant ships became subject to, and participants in, warlike operations, inasmuch as they all fell within the compulsive area of Admiralty regulations. The Defence of the Realm Act, 1914 (5 Geo. 5, c. 8), provided by s. 1, sub-s. 1 (*d*), that for securing the public safety and the defence of the realm regulations might be made "to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty." Under this statutory power cogent

(1) [1918] A. C. 101, 112.

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regulations were made including (inter alia) regs. 36 to 39. Reg. 37 is as follows: "Every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty or Army Council, and shall obey any orders given, whether by way of signal or otherwise, by any officer in command of any of His Majesty's ships, or by any naval or military officer engaged in the defence of the coast. . . . ." It is a criminal offence to disobey any such regulation or order. By s. 46 of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), it was made a crime for the master of a merchantman under convoy of a British ship of war to disobey any lawful signal, instruction, or command of the commander of the convoy. Sect. 31 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), provides as follows: "Every master or other officer in command of any merchant or other vessel under the convoy of any ship of Her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and, if he shall fail to obey such directions, such commanding officer may compel obedience by force of arms, without being liable for any loss of life or of property that may result from his using such force." I have quoted the above statutes and regulations, inasmuch as the argument of Sir John Simon for the owners of the *Inkonka* largely turned upon their compulsory and penal effect.

The contract now before me is a charterparty; but it is well to recall the words of Lord Shaw of Dunfermline in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1): "This doctrine of proximate cause will be considered in the same light whether in contracts of marine insurance or in contracts of sea carriage, and good sense suggests that it should be so." With this passage may be read the observations of Scrutton L.J. and Mr. MacKinnon in their work on charterparties, 9th ed., art. 79 and notes. In the *Leyland Case* (2) Lord Shaw of Dunfermline observed that "Causation is not a chain, but a net." I may venture to

(1) [1918] A. C. 350, 368. (2) [1918] A. C. 350, 369.

add that it is a net in which a judge of first instance may easily become entangled. Sect. 55, sub-s. 1, of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), provides: "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against." It will be observed that the words in the present charterparty are "all consequences of hostilities or warlike operations"; but I conceive that since the decision in *Ionides* v. *Universal Marine Insurance Co.* (1) in 1863, it is established law that the words "all consequences" must be treated as meaning the "totality of causes," not "their sequence, or their proximity or remoteness": see per Willes J. in that case (2) and per Lord Sumner in the *Matiana Case.* (3)

Now bearing the above-stated matters in mind, let me briefly deal with the facts of this case. In the first place I think that the *Inkonka* was not herself engaged in a "warlike operation." She was a merchantman. So far as I know she was not armed. She carried hospital stores for the British Government. She had no war material in the ordinary sense aboard. Her aim was to get as peacefully and expeditiously as she could from Salonica to Taranto. It is true that if assailed by a submarine she might have attacked the latter in defence by ramming; but the same might be said of all other merchant vessels, and such a contingency cannot of itself be said to put her within the area of "warlike operations." She was never, in fact, attacked, nor is there any evidence that hostile craft were in her proximity. It is true that she had on board a few British troops and officers; but it does not appear whether they were invalids or not. Probably they were invalids or convalescents. She was not a transport in the ordinary sense. If she had been such a vessel it might be held that she was engaged in warlike operations. In the *Petersham Case* (4) Lord Atkinson said:

(1) 14 C. B. (N. S.) 259.
(2) 14 C. B. (N. S.) 259, 290.
(3) [1921] 1 A. C. 104.
(4) [1921] 1 A. C. 100.

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"The transfer of the combative forces of a power from one area of war to another or from one part of an area of war to another part, for combative purposes, would, I think, be a warlike operation." Assuming that this passage is agreeable to the other opinions in the House of Lords, yet I think that Lord Atkinson only meant to refer to vessels which were either vessels of war or transports in the ordinary sense. The dominant features of the ship and the dominant object of her voyage must, I humbly venture to think, be looked at. It cannot be that the presence of a few soldiers aboard, whether wounded or unwounded, turns a merchantman into a transport or changes an otherwise peaceful voyage into a warlike undertaking. Many merchantmen during the war carried several Royal Navy men for the purpose of serving the protective guns, or for other reasons. Such fact would not, I conceive, turn a merchantman into the equivalent of a man of war. If it did, then the liability of war-risk insurers would be vastly increased. There is here no finding of fact on this point by the arbitrator which could lead to the conclusion that the *Inkonka* was herself engaged in a warlike operation. This view is, I believe, consonant with the opinion expressed by Roche J. in *Owners of S.S. Larchgrove* v. *The King*. (1) The facts in the *British and Foreign Steamship Co.* v. *The King* (2) were quite different. Apart from the admission made by the Crown in that case, it is to be noted that the vessel there in question, the *St. Oswald*, was actually engaged as a transport in the Eastern Mediterranean, and assisting in the evacuation of troops from Gallipoli. Now the *Inkonka* here was, of course, sailing without lights in a war region; but it is now clear from the *Petersham* and the *Matiana Cases* (3) that an ordinary merchantman is none the less engaged on an operation of peace rather than an operation of war because she is without lights pursuant to imperative Admiralty directions. The *Inkonka* was also sailing under convoy of H.M.S. *Pincher*, and was under enforceable obedience to her. A convoy has been described by Maude

(1) 36 Times L. R. 108. (2) [1918] 2 K. B. 879.
(3) [1921] 1 A. C. 100, 104.

and Pollock on Merchant Shipping as "a naval force, consisting of a ship or ships appointed by the Government, or by the commander of a station, to escort and protect merchant ships proceeding to certain parts." I presume that a convoy may consist of one war vessel only escorting a single merchantman. It is now clear from the majority opinions in the *Matiana Case* (1) that a merchantman under naval convoy, and bound to obey that convoy, is not thereby engaged in a warlike operation. The convoy may be so engaged, but the merchantman convoyed sails on a different footing. I may invoke the striking and cogent illustration given by Atkin L.J. in the Court of Appeal in the *Matiana Case*. (2) He said: "The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peacelike operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding." I infer from the general body of opinion in the House of Lords in the *Petersham* and *Matiana Cases* (3) that the naval convoy in this present case should be deemed to be engaged in a warlike operation. I doubt if Lord Sumner expressed any definite view on the matter, but I think that such is the broad result of the general opinion in those cases. If so, then the question still remains whether the *Inkonka* was stranded as a "consequence of warlike operations." Lord Cave, in the *Petersham Case* (4), put the point as follows: "It is necessary to show first that there were hostilities or warlike operations which could have caused the collision, and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations." It was mainly upon this second point that the opinions in the House of Lords differed in the *Matiana Case*. (1) It is essential to ascertain the view of the majority of the law Lords in that case.

Now the broad facts in the *Matiana Case* (1) were these: She was sailing under convoy and without lights. She was

(1) [1921] 1 A. C. 104.
(2) [1919] 2 K. B. 670, 698.
(3) [1921] 1 A. C. 100, 104.
(4) [1921] 1 A. C. 100.

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bound to obey the orders of the convoy and was under their compelling directions. She was in a region infested with submarines. The senior naval officer ordered a change of route. The *Matiana* accordingly changed her course. She was bound to do so. Then an order to zigzag was given. The *Matiana* obeyed it. About two hours afterwards she struck a small unlighted reef. The night was calm. No breakers were seen ere she struck. Her master was blameless. He was, by the order of the escort, travelling upon an unusual route. If the order had not been given, or if the reef had been lighted, the accident would not have occurred. Upon these facts the majority of the law Lords held that there was no loss in consequence of a warlike operation. This ruling is of far-reaching effect. It establishes that if a merchantman is lost by striking a rock or stranding or the like peril of the sea, whilst being compelled by an accompanying escort to take an unusual route, and/or to navigate either zigzag or in some other unusual manner, the loss is a peril of the sea and not, without more, a consequence of warlike operations.

I feel that this ruling is substantially inconsistent with the dictum of that great lawyer, Swinfen Eady M.R., in *British and Foreign Steamship Company* v. *The King* (1), where, in reference to that case (where the *St. Oswald*, sailing without lights, pursuant to Admiralty orders, collided with a French battleship), he said: "What occasioned the collision? And the answer is that it was solely occasioned by obedience to orders to sail without lights and to go at full speed. Such a proceeding was in defiance of the rules of good seamanship, but necessitated by the exigencies of the warlike operations then in progress."

Now, in my humble opinion, the facts in the present case cannot be distinguished from the facts in the *Matiana Case*. (2) The details vary, but the salient features are alike. Just as collision is, prima facie, a marine risk, so stranding is, prima facie, a marine risk. Just as the *Matiana* was ordered to take an unusual course, so the

(1) [1918] 2 K. B. 879, 885. (2) [1921] 1 A. C. 104.

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Inkonka was ordered to enter Taranto when her master, as a matter of good seamanship, would have desired otherwise. Just as the *Matiana* was under the compulsion of her escort, so the *Inkonka* was under the compulsion of H.M.S. *Pincher*. Just as the *Matiana* struck a reef so the *Inkonka* went ashore. Just as the *Matiana* was held to have suffered from a sea risk, so I hold that the *Inkonka* suffered also from a sea risk. I see no material distinction between the two cases.

The arbitrator here has found as a fact that the stranding of the *Inkonka* was caused by the inefficient lights of the pilot escort, and that if those lights had been adequate there was no reason why the *Inkonka* should not have safely reached Taranto. If the element of compulsion by H.M.S. *Pincher* be eliminated, this present case seems to bear much resemblance to *Ionides* v. *Universal Marine Insurance Co.* (1) There the *Linwood* got ashore because a light had been removed from Cape Hatteras in the course of the Civil War by the Confederate troops. Had the light been burning, the *Linwood*, a Federal ship, would not have been wrecked. It was held that the proximate cause of the loss was a peril of the sea, and not the hostile act of the Confederate troops in extinguishing the light.

In the present case I support the award of the arbitrator. I hold that although the *Inkonka* was stranded whilst being navigated under war conditions, yet her damage did not arise in consequence of warlike operations. Many decisions were cited to me by Sir John Simon and Mr. Neilson for the owners, and by Mr. Raeburn for the Shipping Controller. If the case had been free from authority I should have ventured, with the greatest diffidence, to state the rules which I think might well prevail upon the points at issue in this and other cases under clause 19, but there is now much authority on the matter. Unhappily, however, it is in a state of great doubt and complexity. I find it most difficult to extract any guiding principle from the judgments. Dictum conflicts with dictum and decision opposes decision. A judge

(1) 14 C. B. (N. S.) 259.

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of first instance is indeed embarrassed in analysing and weighing the various and variant opinions of great authorities. I have therefore abstained from expressing any view save that which directly bears on the present case, and I omit any expression of opinion upon such a point, for example, as to whether or not *Ard Coasters* v. *The King* (1) and *Richard de Larrinaga* v. *Admiralty Commissioners* (2) are consistent with the opinion given by the House of Lords in the *Petersham* and the *Matiana Cases*. (3) I venture respectfully to express the hope that an authoritative formulation may ere long be given which will remove the existing doubts, settle the relevant principles, and guide the daily application of the law.

I uphold the award of the arbitrator in this case. The owners of the *Inkonka* must pay the costs of the proceedings before me.

Award upheld.

Solicitors for owners : *Pritchard & Sons.*

Solicitor for Shipping Controller : *Treasury Solicitor.*

(1) 36 Times L. R. 555. (2) [1920] 3 K. B. 65.
(3) [1921] 1 A. C. 100, 104.

J. E. A.

[IN THE COURT OF APPEAL.]

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Nov. 20.

CLARK *v.* COX, McEUEN AND COMPANY.

Contract—Sale of Goods—Construction—Goods to be carried by Sea—Declaration of Ship—Appropriation of Goods to Contract—Loss of Vessel and Goods—Declaration made after and with Knowledge of Loss—Validity.

By a contract dated December 11, 1917, the defendants sold goods to the plaintiff to be shipped during December to February, 1918, per steamer from the East to Liverpool, where they were to be delivered, the name of the vessel, marks and full particulars to be declared to the buyer in writing with due despatch. The contract also provided: "(1.) Should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled so far as regards such lost vessel or vessels on the production of the bill or bills of lading or other satisfactory proof of shipment by sellers so soon as fairly practicable after the loss is ascertained. (2.).... Should the vessel or vessels and the goods or any portion thereof be lost, the contract to be cancelled for the whole or any such portion, but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, this contract to stand good for the whole or such portion." On March 27, 1918, the defendants declared in fulfilment of the contract goods shipped on a named steamer which sailed from Singapore on January 21, 1918, but was lost at sea by enemy action about February 26, 1918. At the time of the declaration both the plaintiff and the defendants knew that the ship and cargo had been lost. In an action for damages for failure to deliver the plaintiff contended that the declaration, having been made after the defendants knew of the loss of the vessel, was invalid:—

Held, by the Court of Appeal, affirming the decision of Bailhache J., that the declaration was made with due despatch, and was good although made with knowledge of the loss, and that the contract was consequently cancelled.

In re Olympia Oil & Cake Co. and Produce Brokers' Co. [1915] 1 K. B. 233 commented on.

APPEAL from a decision of Bailhache J.

The action was for damages for non-delivery of a consignment of pepper in breach of a contract dated December 11, 1917, whereby the defendants contracted to sell to the plaintiff the goods in question to be shipped during December, 1917, and/or January to February, 1918, per steamer or steamers from the East via Canal to Liverpool, the name of the vessel,

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marks, and full particulars to be declared to the buyer in writing with due despatch.

The contract, which followed the form of arrival contract of the General Produce Brokers' Association of London, contained the following provisions: "(1.) Declaration of Shipment. The name of the vessel, marks, and full particulars to be declared to the buyer in writing with due despatch, but should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled so far as regards such lost vessel or vessels on the production of the bill or bills of lading or other satisfactory proof of shipment by sellers so soon as fairly practicable after the loss is ascertained. (2.) Loss or Transhipment. Should the vessel or vessels and the goods or any portion thereof be lost, the contract to be cancelled for the whole or any such portion, but should the vessel or vessels be lost, and the goods or any portion thereof be transhipped to some other vessel or vessels and arrive on account of the original importer, this contract to stand good for the whole or such portion."

On March 27, 1918, the defendants declared in fulfilment of the contract 136 bags of pepper, shipped on board a steamer called the *Eumæus* which sailed from Singapore on January 21, 1918, and added: "Owing to the vessel having been lost by enemy action the contract is cancelled." It was known to both parties that the ship had been lost at sea by enemy action on or about February 26, 1918. The plaintiff refused to accept the declaration, contending that it was invalid, on the ground that it was made after the loss of the vessel was known to the defendants, and was not made with due despatch. He claimed as damages the difference between the contract and market price. The defendants contended that the vessel having been lost before declaration, the contract was by its terms cancelled.

Bailhache J. held that under the circumstances the declaration was made with due despatch, and that upon the construction of the contract it was cancelled, and the defendants were accordingly not liable. In the course of his judgment he said that the two clauses in the contract were

redundant and might have been more happily worded. In his opinion their meaning and effect was that a seller who duly ships the contractual goods and makes the requisite declaration with due despatch is excused from liability for non-delivery, if the vessel and goods are lost, whether before or after declaration, and knowledge of the loss at the time of making the declaration was immaterial. The contract as regards goods so shipped and declared was cancelled.

The plaintiff appealed.

Disturnal K.C. and *G. D. Keogh* for the appellant. The declaration in this case was invalid and the defendants were bound to deliver the goods. No vessel could apply to the contract until after declaration. The meaning of the contract is that if the vessel is lost the declaration is cancelled so far as such vessel is concerned, and the sellers can make another; but the contract is not cancelled.

The sellers cannot appropriate to the contract goods which are not in existence at the time of the declaration: *In re Olympia Oil & Cake Co. and Produce Brokers' Co.* (1)

[LORD STERNDALE M.R. The judgment of Avory J. in that case amounts to this, that there cannot be a good declaration of goods which do not exist, whether the seller knows it or not.]

Yes.

[LORD STERNDALE M.R. Then it does not apply to this case, because you contend that there may be a good declaration if the seller does not know that the goods are in fact non-existent.]

That was a case arising under the consultative jurisdiction, and it went back to the arbitrators. The subsequent proceedings in the litigation are detailed by Scrutton L.J. in *Produce Brokers' Co.* v. *Olympia Oil & Cake Co.* (2)

[LORD STERNDALE M.R. referred to *Produce Brokers' Co.* v. *Olympia Oil & Cake Co.* (3)]

Here the sellers at the time of the declaration had no goods

(1) [1915] 1 K. B. 233. (2) [1917] 1 K. B. 320.
(3) [1916] 1 A. C. 314.

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in existence which they could appropriate to the contract, and the declaration is bad.

[They also referred to *Thornton* v. *Simpson* (1) and *Johnson* v. *Macdonald*. (2)]

Barrington-Ward K.C., *Le Quesne* and *G. R. Mitchison* for the respondents. This is purely a case of construction. The question of knowledge of the loss is not to be read into the contract: *Manbre Saccharine Co.* v. *Corn Products Co.* (3), where the law is summarised by McCardie J. (4) The declaration here was good although the sellers knew at the time of making it, that the vessel had been lost, and the contract is under its terms cancelled.

Keogh in reply.

[*Karbery & Co.* v. *Blythe, Green, Jourdain & Co.* (5) was also referred to.]

LORD STERNDALE M.R. This is an appeal from Bailhache J.; and the question raised is not an easy one, because the terms of the contract are as he pointed out in some ways rather inconsistent one with another. [The Master of the Rolls then stated the facts and continued:] It is upon those facts that the question arises whether the decision of the learned judge below was right or not. It certainly seems at first sight to be in conflict to some extent with the decision of the Divisional Court (Avory, Rowlatt and Shearman JJ.) in *In re Olympia Oil & Cake Co. and Produce Brokers' Co.* (6), although in my opinion the contracts are not the same; and one of the learned judges in that case treated the matter as though he had a c.i.f. contract before him, which was not the case. However, that case has certainly been observed upon in subsequent decisions, especially in *Produce Brokers' Co.* v. *Olympia Oil & Cake Co.* (7) between the same parties by Scrutton L.J. I think it is sufficient to say, with respect to that case, that it was upon a different contract, so that I do not think it is necessary to consider whether it was right

(1) (1816) 6 Taunt. 556.
(2) (1842) 9 M. & W. 600.
(3) [1919] 1 K. B. 198.
(4) Ibid. 201.
(5) [1915] 2 K. B. 379.
(6) [1915] 1 K. B. 233.
(7) [1917] 1 K. B. 320.

or wrong. But on one point I do respectfully dissent from the opinion expressed by the Divisional Court and that point is this: the learned judges seem to me to have held that although a clause of this kind might operate as a cancellation of the contract where the loss was not known to the party making the declaration, it could not do so if that loss was known to the party making the declaration. With respect I do not think, except as a matter of bona fides, or mala fides (and no mala fides is suggested here), that the knowledge makes any difference. Either the declaration may be made after loss or it may not. If it is not a good declaration, because the subject-matter of the declaration is no longer in existence, that is a matter which is independent of the knowledge of the parties altogether; and the only relevance that the knowledge might have would be to indicate mala fides, which is not here alleged. On that point, with respect, I do not agree with the opinions expressed by the learned judges; and I have some confidence in saying so, because I think that in what I am saying on that point I am agreeing with what was thrown out in the Court of Appeal by Scrutton L.J. in *Produce Brokers' Co.* v. *Olympia Oil & Cake Co.* (1), where the decision of the Divisional Court was commented upon.

The argument for the plaintiff was, first, that this was not a vessel "which may apply to this contract"; that it did not satisfy those words, because no vessel could "apply" to the contract until the declaration had been made; and when the declaration was made the vessel was lost, and could not, therefore, apply to the contract. The second argument was that the first clause which deals with the vessel being lost before declaration only means that as this contract, when the declaration is made, is a contract to deliver by a named ship, it therefore imposes two obligations upon the sellers—namely, to deliver the goods, and to deliver them by that ship—and that all that was intended by the clause was to exonerate the sellers from the obligation to deliver by that particular ship, and to leave them under the obligation to deliver in some other way, by substituting

(1) [1917] 1 K. B. 320.

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another ship, which otherwise they could not have done. Considerable stress was laid in support of that argument upon the words "this contract to be cancelled so far as regards such lost vessel or vessels." It is said that does not refer to the goods, or any other portion of the goods, in the vessel, but to the vessel or vessels alone; and it was pointed out that clause 2 provides: "should the vessel or vessels and the goods or any portion thereof be lost, the contract to be cancelled for the whole or any such portion," dealing with the goods, and not with the vessels. There is considerable force in that argument, and it certainly shows that this contract is not made with the clearness which might be desired. Another matter was also pointed out. I think both parties agree that the second clause, with the marginal note "Loss or Transhipment," must be confined to loss of the vessel or goods after declaration; and although it does not say so I think that is the reasonable construction of the matter. If another view were taken and this second clause were held according to the strict letter to apply to losses before declaration then undoubtedly it would be in conflict with the previous clause, but as applied to losses after declaration it does not conflict in the same way with it. But there does remain this difficulty—that, construing these clauses as the defendants invite us to do, and as Bailhache J. has done, losses before declaration and losses after declaration are treated in a different way. Before declaration if the vessel is lost and part of the cargo comes forward, the contract is still cancelled, and the buyer is not obliged to accept that transhipped portion. In the case of loss after declaration he has to accept any transhipped portion which comes forward, and no particular reason was pointed out why loss before declaration was to be treated in a different way from loss after declaration. I pointed out these difficulties, because I confess they caused a good deal of doubt in my mind; but considering and giving due weight to all of them, I think the construction which Bailhache J. put upon this contract is the right one, and I think the intention was this—to safeguard the sellers against difficulties which they

might get into if they had made a late shipment and the vessel was lost before they had time to make their declaration. That declaration was to be made with "due despatch"; and it might very well be, especially in war time, that "due despatch" would be at a time when the contract period had expired, and that they might find themselves in the difficulty of having made a late shipment, and of not being able to make their declaration until it was too late for them to substitute another shipment, even if they could do it. I think their intention was amongst other things to safeguard themselves against a position of that sort; and when they say "This contract to be cancelled so far as regards such lost vessel or vessels," I think they are using words which convey a great deal more than simply "This declaration shall be set aside" or "This declaration shall not be considered as binding." It is true the clause says, "so far as regards such lost vessel or vessels" but I think it must mean also as regards the parcel which was carried upon such lost vessel or vessels. In this case the parcel carried was the whole parcel, the whole subject of the contract, and therefore the contract would be cancelled as regards the whole of it. I think that the contract contemplates that a declaration may be made after loss and that this vessel was a vessel which applied to the contract. She was lost before declaration; and putting the proper construction as I think it ought to be upon the words, the contract was cancelled with regard to that vessel and what she was carrying. I think, therefore, the learned judge's decision was right and that this appeal should be dismissed with costs.

ATKIN L.J. I agree. I have had the same doubts as the Master of the Rolls but upon a survey of the whole of this contract I have come to the conclusion that the decision of the learned judge below was right.

It was contended that the first clause could not apply to the case where the vessel was lost at the time the declaration was made, because it was said one could only make a declaration of an existing vessel and therefore there could be

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no vessel or vessels "which may apply to this contract" if as a matter of fact the vessel had been lost before the declaration was sought to be made. As authority for that proposition the case of *In re Olympia Oil & Cake Co. and Produce Brokers' Co.* (1) was cited. I think that proposition is too wide, because eventually it had to be conceded that if the facts were that a shipment had been made, and then a declaration was made in ignorance of the loss of the ship, and it was then ascertained after the declaration that the ship had been lost before the declaration, that was a state of facts to which this clause was intended to apply. That is common ground or at any rate is conceded on behalf of the plaintiff. If that be so, then there is a vessel or vessels "which may apply to this contract." It is the vessel or vessels which had been applied to the contract by the declaration, and it seems to me therefore to be unnecessary to consider the larger proposition, which is too wide for the purposes of the plaintiff's case, that in dealing with this clause one cannot make a valid declaration where the ship has been lost. *In re Olympia Oil & Cake Co. and Produce Brokers' Co.* (1) was decided by the Divisional Court upon a different contract to this, not containing these clauses. Whether it is now a binding authority or not is a matter which will have to be decided when the actual proposition of law for which it is an authority comes into question again, but I do not think it is really helpful in this case, because here we have to construe these special clauses.

One starts then with the proposition which is admitted and I think has to be admitted by the plaintiff—that the first clause applies in a case where the declaration has been made after loss, but without knowledge of loss; and if it so applies I can see no reason at all why it should not apply where a declaration is made after loss but with knowledge of the loss. There seems to me to be no reason at all in a business point of view why there should be any difference between those two propositions. I think the true construction of this clause is that if a declaration is made, then the ship which is named

(1) [1915] 1 K. B. 233.

in the declaration is the vessel which applies to the contract, and I think that the declaration may be made either with or without knowledge of the loss. Under these circumstances if the vessel was lost before the date of the declaration the clause proceeds to say: "This contract to be cancelled so far as regards such lost vessel or vessels." The contention of the plaintiff was that that ought to be read as saying: "This declaration is to be treated as inoperative." If it really meant that it would have been a very easy thing to say so; but instead of saying that the declaration is to be treated as inoperative the words go, not to the declaration but to the cancellation of the contract: "this contract to be cancelled so far as regards such lost vessel or vessels on the production of the bill or bills of lading, or other satisfactory proof of shipment." I think that must mean proof of shipment in pursuance of the contract. Under these circumstances it appears to me that the true view is what the clause says—namely, that the contract is cancelled so far as the goods which are coming forward in that named vessel are concerned, and so far as the obligation to deliver that quantity of goods under the contract is concerned. I think that one is helped to that conclusion by reading the provisions of the General Produce Brokers' Association of London which are annexed to the contract. Rule 9, clause (*c*), states: "Each declaration is to be treated as a separate contract." The net effect is this. When a seller has shipped goods in compliance with a contract on board a ship he is then, if the ship is lost, entitled to relieve himself of the contract if he is able to appropriate the goods to some contract which he has made, and in respect of which he still has the right of appropriation. It is plain that the business meaning of the contract is that, while it is a contract for arrival, if after a declaration and appropriation the vessel is lost, the obligation to deliver the goods is one from which the sellers are clearly intended to be relieved by the second clause. Under these circumstances, I can see nothing unusual in business for the sellers to bargain that they shall be relieved before appropriation if in fact they have shipped within the terms of the contract goods which, if

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the ship had not been lost, they would have been able to appropriate to the contract. That, to my mind, is the proper view of the case. I think the sellers did not mean to leave themselves with the burden, after they had shipped, perhaps on the last day of shipment, goods corresponding to the contract, of finding themselves under a liability for breach of contract. I agree that questions may arise as to the construction of the second clause. If it is quite plain that the words in the second clause only apply to a loss after declaration, the difficulty is probably removed; but I do not desire to express any opinion on that, because that may arise to be determined hereafter. To my mind on the facts of this particular case the sellers are relieved from liability, and the decision of the learned judge below was right.

YOUNGER L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

Solicitors for respondents: *Waltons & Co.*

G. A. S.

ATTORNEY-GENERAL *v.* COMPANY OF PROPRIETORS OF SELBY BRIDGE.

1920
July 26.

Tolls—Exemption—Motor-car "employed" in military Service—Private Car of Officer used under Authority—Car conveying "officers and soldiers"—Soldiers and Civilian employed on Government Work—Army Act, 1881 (44 & 45 *Vict.* c. 58), *s.* 143, *sub-s.* 1.

The exemption from payment of toll in passing along a road or over a bridge contained in s. 143 of the Army Act, 1881, in favour of carriages "employed" in the military service of the Crown when conveying officers and soldiers of the regular forces on duty extends to the private motor car of an officer which he is authorized to use for journeys on duty at the public expense.

Craig v. *Nicholas* [1900] 2 Q. B. 444 distinguished, but observations of Ridley J. adopted.

The exemption from payment of toll in passing along a road or over a bridge contained in that section in favour of carriages belonging to the Crown when conveying "officers and soldiers" of the regular forces on duty extends to a motor-car belonging to the Crown, which contains, besides a non-commissioned officer and soldiers of the regular forces, a civilian employed as clerk of the works in certain Government works who is authorized to be conveyed in the car for the purposes of the Crown, and has a works pass from the military authorities.

SPECIAL CASE stated by the parties for the opinion of the Court.

The Company of Proprietors of Selby Bridge, the defendants, were incorporated under the Statutes 31 Geo. 3, c. lx., and 43 Geo. 3, c. xlviii., which authorized them to construct a bridge over the river Ouse at Selby in Yorkshire and to charge tolls in respect of vehicles and persons passing over the bridge as therein provided; and pursuant to these statutes they constructed a bridge which was known as Selby Bridge.

On June 9, 1917, Captain W. Raynes Stowell, an officer holding a commission in the Royal Engineers, and a member of His Majesty's regular forces, received from the Northern Command a written authority of that date, which so far as material was as follows: "Authority for the use of private motor car (two seater) is given to Captain W. R. Stowell, R.E., for journeys on duty to visit A.A. Defence Stations in York District, for which this officer is entitled to conveyance at

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the public expense—on basis of application dated 2–6–17. The authority is granted under General Headquarters letter H.F.C.R. 2212 dated 18–3–16. Claims to be submitted monthly through this office, journeys detailed, and this authority quoted. (Signed) C. J. G., Staff Captain, for A. Q.-M.-G. N. Cd."

Captain Stowell thereupon became entitled to an allowance from the public funds for the use of that motor-car on these journeys, under the Allowance Regulations made with reference to officers and others using their own motor vehicles on public journeys: see these Regulations, ss. 386–390.

On June 9, 16 and 29, and July 17 and 18 respectively Captain Stowell was making journeys in the motor-car in the course of his duties mentioned in the authority, and was entitled to an allowance in respect of these journeys, and on each of these days he drove in the car to the said bridge and desired and sought to pass over the bridge in the car for the purpose of completing his journey. On each of these days he claimed of the defendants' duly appointed toll-keeper and authorized agent in that behalf to be entitled to pass over the bridge in the car without payment of any toll; on the first of these days he informed the toll-keeper that he was on duty as an officer in His Majesty's forces and was driving the car under authority from the military authorities of His Majesty, but did not then produce that authority; on the second of these days he produced to the toll-keeper the authority and the order of his commanding officer ordering him to make the journey; and on each of the succeeding occasions he informed the toll-keeper that he was claiming to pass over the bridge as an officer of His Majesty's forces on duty and possessed of the said authority. On each of these occasions the toll-keeper refused to allow Captain Stowell to pass over the bridge in the car except on payment of 9*d.* by way of toll, and, as the latter would have been unable to pass over the bridge in the car except by payment of the sum so demanded, he was compelled to pay and did pay that sum, in each case under protest. The sum paid by Captain Stowell was in each case allowed to him as between

him and His Majesty as money which the former was compelled to pay in performance of his duties.

On June 6, 1917, George Charles Williams, who was a quartermaster-sergeant in the Royal Engineers, a military foreman of works, and a soldier in His Majesty's regular forces, was proceeding on duty in, and in charge of, a four-seated motor car belonging to His Majesty, and being properly employed by Williams for the purposes of his duty. In the car in addition to Williams were Lance-Corporal Dibbs, a soldier of His Majesty's regular forces, who was driving the car in the course of his duty, Company Sergeant-Major Johnson, a soldier of His Majesty's regular forces, who was travelling in the car in the course of his duties as a soldier, and also a civilian named Schofield, who was employed as a clerk of the works in certain Government works, whom Williams was authorized to convey in the car for the purposes of His Majesty, and who had a works pass from the competent military authorities. Williams in the course of his duties claimed of the toll-keeper to pass over the bridge in the car containing the occupants aforesaid without payment of toll, and informed him of the facts above mentioned regarding the car, himself, and the other occupants of the car, and the works pass was produced. The toll-keeper, however, refused to permit the car to proceed over the bridge whilst containing the said civilian except on payment of a toll of 9*d.*, which Williams was thus compelled to pay, and did pay under protest. That sum was allowed to Williams as between him and His Majesty, as money which the former was compelled to pay in the performance of his duties. The defendants, having been informed of the whole of the matters aforesaid, refused on demand to return these several sums amounting in the aggregate to 4*s.* 6*d.*, and claimed to retain the same as of right.

On December 1, 1917, this action was commenced by a writ of subpœna on an information whereby the Attorney-General claimed that the said sum of 4*s.* 6*d.* should be adjudged to His Majesty.

The questions for the Court were: Whether either Captain

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Stowell or Quartermaster-Sergeant Williams was entitled to pass over the bridge in the car in which he was travelling without paying toll, either (*a*) by virtue of the Royal Prerogative, or (*b*) under s. 143 of the Army Act, 1881. (1)

G. A. H. Branson (*Sir Gordon Hewart A.-G.* with him) for the Crown. In the first of the two cases in question Captain Stowell was entitled to pass over the bridge in the motor-car without paying toll by reason of s. 143, sub-s. 1 (1), of the Army Act, 1881. In this case the car was "employed" in the military service of His Majesty within the meaning of the section. Though the car was the private property of the officer, yet as he was using it under an authority from the military commander for journeys on duty at the public expense, it was employed in the military service of the Crown within the contemplation of that section, and it was therefore exempted thereby from payment of this toll. This case belongs to the third class of cases enumerated by Ridley J. in *Craig* v. *Nicholas*. (2)

In the second case likewise the non-commissioned officer in charge of the car was entitled to pass over the bridge in the car without paying toll by reason of s. 143, sub-s. 1. (1) In this case the car was a car belonging to His Majesty and was conveying an "officer and soldiers" of the regular forces within the meaning of the section. It is admitted that the car was the property of the Crown, and as it was carrying a non-commissioned officer and two soldiers of the regular forces it is clearly within this provision of the section. The fact that the car was also carrying a civilian is immaterial. The civilian in question was on duty for the Government, although not on military duty, and he held a pass from the

(1) The Army Act, 1881, s. 143, provides: "(1.) All officers and soldiers of Her Majesty's regular forces on duty or on the march; and . . . . all carriages and horses belonging to Her Majesty or employed in her military service, when conveying any such persons as above in this section mentioned, or baggage or stores, or returning from conveying the same shall be exempted from payment of any duties or tolls . . . . in passing along or over any turnpike or other road or bridge, otherwise demandable by virtue of any Act . . . . already passed or hereafter to be passed."

(2) [1900] 2 Q. B. 444, 447.

military authorities. This car also was exempted by the section from payment of toll. In *Westover* v. *Perkins* (1) it was held that a carriage belonging to the Crown which was being used by a civilian with the permission of the Crown was exempt from toll; and this is a stronger case than that, because here the car was not merely used by a civilian but was conveying soldiers on duty.

Further, in each of the cases in question the car, being either the property of or used in the service of the Crown, was exempted from payment of toll by the Royal Prerogative. The Crown is not liable for tolls except in so far as it is rendered liable to them by statute; and it is not bound by any statute unless it is mentioned therein either expressly or by necessary implication: *Weymouth Corporation* v. *Nugent* (2) per Lord Cockburn C.J. and *Smithett* v. *Blythe*. (3) The statute imposing the toll here in question does not mention the Crown either expressly or by necessary implication.

Sylvain Mayer K.C. (*Poyser K.C.* with him) for the defendants. As to the first case, Captain Stowell was not entitled to pass over the bridge in the motor-car without payment of toll by reason of s. 143, sub-s. 1. (4) The car was not "employed" in His Majesty's military service within the meaning of the section. In order that a vehicle may be so employed, it must either belong to the army as part of its equipment, or it must be requisitioned, or it must be exclusively employed in military service: see per Ridley J. in *Craig* v. *Nicholas*. (5) The car now in question was not "employed" in military service in any of these senses. This car was not employed in military service in the third of these senses, inasmuch as the officer was not bound to use it only when on duty, but might use it when not on duty for his own pleasure. Further, the car was not employed in military service, because the officer was not bound to use it at all on military service, but might make his journeys on duty in any other way he pleased. This car was not "employed" in

(1) (1859) 2 E. & E. 57.
(2) (1865) 6 B. & S. 22, 34, 35.
(3) (1830) 1 B. & Ad. 509.
(4) See note (1), ante, p. 152.
(5) [1900] 2 Q. B. 444, 447.

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His Majesty's service any more than the officer's private carriage in *Craig* v. *Nicholas* (1), and the present case is governed by that case. Moreover, where, as in the present case, a person in the service of His Majesty receives authority to use when on duty a vehicle which is his own private property, the vehicle is not "employed" within the meaning of the section unless its user is confined within the scope of the authority; and here the authority given to the officer was to use the car so as to draw only the allowance authorized by the military Regulations which restrict the total charge to the cost of conveyance by the cheapest means. The user of this car was not in accordance with that authority.

In the second of these cases the non-commissioned officer in charge of the car was not entitled to pass over the bridge in the car without paying toll by virtue of s. 143. In that case the car belonged to His Majesty, but it was not conveying "officers and soldiers" within the meaning of the section. These words must be construed as meaning "only officers and soldiers"; and in this case the car conveyed, besides soldiers, a civilian who did not cease to be a civilian because he had a pass from the military authorities. If a vehicle belonging to His Majesty is entitled to pass over the bridge without payment of toll when it contains, besides soldiers, one civilian, it will also be entitled to do so when it contains any civilian, or any number of civilians.

In neither of these cases was the car exempted from paying toll by virtue of the Royal Prerogative. Where a statute expressly provides that the Crown is to exercise in a particular manner and subject to certain limitations powers that were previously within its prerogative, the Crown can only exercise these powers in the manner so provided, and as regards these matters the prerogative is merged in the statute and no longer exists: per Swinfen Eady M.R. in *De Keyser's Royal Hotel* v. *The King* (2); and see *Northam Bridge Co.* v. *The Queen*. (3) Here s. 143 of the Act of 1881 expressly provides how far vehicles belonging to or in the service of the Crown are to

(1) [1900] 2 Q. B. 444. (2) [1919] 2 Ch. 197, 216.
(3) (1886) 55 L. T. 759.

be exempt from toll in passing along or over roads or bridges, and it therefore takes away the right of the Crown to claim exemption from these tolls by virtue of its prerogative.

The Crown is bound by the statutes which impose the toll upon this bridge. The Crown may be bound by a statute in which it is not mentioned, either expressly or by implication, if it be for the public good that it should be so bound: Bac. Abr., tit. Prerogative (E) 5; *Worrall* v. *Harper* (1); *Théberge* v. *Laudry* (2); and *Moses* v. *Parker*. (3) It is for the public advantage that the Crown should be liable to tolls for maintaining this bridge, except in those cases in which it is exempted from tolls by s. 143 of the Act of 1881.

ROWLATT J. In my opinion the Crown is entitled to succeed on this information.

The questions for the Court are whether either of two motor-cars was exempted from payment of toll in passing over Selby Bridge either under s. 143, sub-s. 1, of the Army Act, 1881 (4), or by reason of the Royal Prerogative.

I will consider first whether either car was exempted from payment of the toll by s. 143, sub-s. 1, of the Act of 1881. (4) [His Lordship read the sub-section (4) and continued:] One of these two cars was the private property of an officer in the regular forces who had received authority in writing to use it for journeys on duty in visiting distant defence stations in the district in time of war, on the terms of his receiving under the military regulations an allowance from the public funds for the use of the car on these journeys. The position was not that on his making a particular journey in his own car he should receive the equivalent of the fare which he thereby saved the Government from paying for him. The arrangement was that he should have a standing authority to use his car at any time for journeys in the course of his duty, and should be paid for doing so out of the public funds. In pursuance of that authority he used the car on several

(1) (1614) 1 Roll. R. 65, 67.
(2) (1876) 2 App. Cas. 102.
(3) [1896] A. C. 245.
(4) See note (1), ante, p. 152.

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occasions on journeys in the course of which he had to cross this bridge. In these circumstances was the car exempt from toll under s. 143 ? It was conveying an officer on duty, but in order to be within the section it must also have been "employed" in the military service of the Crown, and not merely used by the officer while on duty like the carriage in *Craig* v. *Nicholas*. (1) In that case the carriage was the private property of the officer, but no arrangement had been made between him and the Government for his use of the carriage on military service. In the course of his duty he had to pass along a road upon which toll was payable. He went in his private carriage, using it incidentally and for his personal convenience while engaged in the performance of his duty. It was held that the carriage was not "employed" in the military service of the Crown within the meaning of the section. The present case bears no resemblance to that case. Here the officer was using the car on the occasions in question under the aforesaid general authority to use it when on duty and to be paid for doing so in public money. It has been argued on behalf of the defendants that the officer need not have used the car on the occasions in question and did so at his own pleasure. I agree that he was not bound to use the car and that he might have gone by some other means. In view, however, of the fact that he elected to use it pursuant to the arrangement between himself and the Government by which he was authorized to use it and paid for doing so, I fail to see how it can be said that it was not employed in the service of the Crown. This case appears to me to fall within the class of cases to which Ridley J. referred in *Craig* v. *Nicholas* (2), when he said : "Besides these"—namely, carriages which belong to the Crown, and carriages which it has requisitioned—"there is a third class of carriages and horses employed in military service for which no requisition has been made, but in respect of which an allowance is made by the Government and which are employed by an officer on duty or on the march, and these also are exempt." Here the Crown did not requisition

(1) [1900] 2 Q. B. 444. (2) Ibid., 447.

the officer's car, but the officer was agreeable that it should be used and paid for by the Crown. In my opinion this car was "employed" in the military service of His Majesty within the meaning of s. 143, and as it was also conveying an officer on duty, it was exempted from toll by virtue of that section.

The other case raises a different question. There the car belonged to His Majesty, and it was conveying a non-commissioned officer and soldiers on duty; but it happened also to be conveying a civilian. The civilian was being conveyed in the car not as a guest for his mere convenience or pleasure, but because he was a clerk of the works in certain Government works, who by authority was sent in this car for the purposes of his work, and had a works pass from the military commander. That being so, the question is whether the car was a car belonging to His Majesty and conveying "officers and soldiers" of the regular forces on duty within the meaning of s. 143. The car was a Government car and it was conveying soldiers on duty. So far, therefore, it would seem that it came within the plain words of the section. It is said, however, that the section must be read as meaning that in such a case the vehicle is not exempted unless it is conveying "only officers and soldiers" on duty. The section does not contain the word "only," and I do not think I ought to read as if it did. It appears to me that a car belonging to His Majesty when conveying officers and soldiers is within the section notwithstanding that it also carries a person like this civilian. I agree that if the car was used for the conveyance of passengers for their mere convenience or pleasure, it might be said that it was not used for the conveyance of persons in the service of His Majesty while on duty according to discipline and proper order. In this case, however, the car was conveying an officer and soldiers on duty, and, without any breach of duty or slackness or laxity of discipline under orders on the part of its military occupants, another man who was not a soldier was conveyed upon it. I cannot see that the presence of that other man destroyed the character of the car as a car conveying an officer and

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soldiers. I, therefore, think that, in this case as in the other, the car was exempt from duty under s. 143.

The question has also to some extent been argued whether these cars or either of them was entitled to pass over the bridge without payment of the statutory toll by virtue of the Royal Prerogative. It was contended on behalf of the informant that the principle is that the Crown by virtue of its prerogative is not prima facie liable for tolls, and is not bound by a statute which imposes tolls unless it is expressly mentioned therein; and that, as the statutes which impose this toll do not expressly mention the Crown, these cars are therefore exempt from the toll. It was submitted for the defendants that this was a case in which the Crown was bound by the statute imposing the toll, although it was not expressly mentioned. Before deciding this question of Prerogative I should desire to look closely at the statutes and at the authorities. It is not, however, necessary that I should express any opinion upon that question in this case, as I have already declared that the Crown is exempt from this toll by s. 143 of the Act of 1881.

I give judgment for the Crown for 4*s.* 6*d.*, and costs.

Judgment for Crown.

Solicitor for the Crown: *The Treasury Solicitor.*
Solicitors for defendants: *Bull & Bull.*

J. R.

ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY), INFORMANT *v.* ANDERTON AND OTHERS, DEFENDANTS. 1920 *July* 27, 28.

Revenue—Succession Duty—Succession to Real Property arising on Death—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 1, 2, 21—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 18.

By s. 1 of the Succession Duty Act, 1853, "The term 'Succession' shall denote any property chargeable with duty under this Act" and "The term 'property' alone shall include real property and personal property."

By s. 2, "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or to the income thereof upon the death of any person dying after the time appointed for the commencement of this Act . . . ." (May 19, 1853) "and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 10 sets out the scale of duties on "successions" and s. 20 provides that the duty is to be paid on the successor becoming entitled in possession to his succession.

By s. 21, "The interest of every successor, except as herein provided, in real property, shall be considered to be the value of an annuity equal to the annual value of such property" (after making certain allowances) "and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; . . . ."

By s. 18, sub-s. 1, of the Finance Act, 1894, "The value for the purpose of succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property, ... and the duty shall be a charge on the property. . . . ."

By his will and a codicil thereto a testator who died in 1860 (inter alia) settled one undivided third part of his real estate upon his eldest son William for life with remainder to his first and other sons in tail male. William's eldest son Charles was born in 1860 and attained the age of twenty-one in 1881. A resettlement made in 1882 contained a provision that if Charles should survive William and have a son who should attain the age of ten years (both of which events happened) Charles might appoint the settled share to himself absolutely. William died in 1904:—

Held that, on the death of William, succession duty became payable

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under s. 18 of the Finance Act, 1894, upon the principal value of the real estate comprised in William's share, and not under s. 21 of the Succession Duty Act, 1853, upon the value of Charles's interest as an annuity, inasmuch as Charles's succession arose within the meaning of s. 18 of the Act of 1894 on William's death, and not when it was originally created under the will and codicil of the testator.

INFORMATION filed by the Attorney-General on behalf of His Majesty, claiming succession duty.

The facts (so far as material to this report) were as follows: By his will, dated February 28, 1857, Charles Scarisbrick appointed William Hawkshead Talbot and Thomas Part executors and trustees and devised and bequeathed to them the residue of his real and personal estate upon trust to pay divers annuities including an annuity of 3000*l.* to each of his two sons William and Charles and his daughter Mary Ann and to divide the residue among the three children equally. By a codicil dated October 11, 1859, the testator settled the share of each child on him or her for life with remainder to their first and other sons in tail male remainder to their first and other sons in tail general remainder to daughters equally with cross-remainders in tail. The testator died on May 6, 1860, and his will and codicil were duly proved. All his children were illegitimate. On December 18, 1903, an order was made in the suit of *Talbot* v. *Scarisbrick* hereinafter mentioned, declaring that upon the true construction of the will and codicil the whole of the testator's estate (subject to the annuities other than the annuities to the children) was settled in undivided thirds on his three children and their respective issue upon the limitations contained in the codicil. At the time of his death the testator owned very large real estate in Lancashire including building land in North Meols and Southport.

On October 15, 1875, W. H. Talbot one of the trustees of the testator's will died and Philip Henry Chambres was appointed a new trustee in his place.

On November 10, 1860, a decree for administration of the testator's estate was made in the action of *Talbot* v. *Scarisbrick*. (1)

(1) (1860) T. 136.

By the Scarisbrick Estate Act, 1877, s. 27, a power of sale and exchange of the real estate was given to the trustees. By s. 28 all moneys arising from any sale or for equality of exchange were to be laid out in land to be settled to the same uses as those contained in the codicil of 1859, and by s. 37 power was given to the Court to make partition between the several settled shares including the personal estate. The information dealt with the settled share of William the eldest son only but no claim to succession duty was made in respect of the personal estate. William was twice married and had seven children by his first marriage and three by his second marriage. His eldest son was Charles F. M. Scarisbrick who was born in 1860 and attained twenty-one on January 21, 1881.

On June 6, 1882, a disentailing assurance was executed to which the parties were William Scarisbrick of the first part, Charles F. M. Scarisbrick of the second part and Thomas Part and Philip Henry Chambres of the third part, by which one undivided third part of the freehold lands of which Charles F. M. Scarisbrick was the first equitable tenant in tail was disentailed and conveyed to such uses as William Scarisbrick and Charles F. M. Scarisbrick should jointly appoint and one undivided third part to which Charles F. M. Scarisbrick was entitled of and in the personal estate which or the proceeds of which were or might be subject to be laid out in the purchase of lands by virtue of the will and codicil or the Scarisbrick Estate Act, 1877, was assigned to the said Thomas Part and Philip Henry Chambres and the defendant Charles Thomas Part upon such trusts as William Scarisbrick and Charles F. M. Scarisbrick should jointly appoint.

The share of real and personal estate which was so disentailed (including any property partitioned and appropriated to the share) is hereinafter referred to as the "William Scarisbrick share."

By a deed of resettlement dated June 7, 1882, between William Scarisbrick of the first part, Charles F. M. Scarisbrick of the second part and Thomas Part and P. H. Chambres of the third part the William Scarisbrick share so far as it

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consisted of a share of real estate was, under the joint power of appointment, vested in William Scarisbrick and Charles F. M. Scarisbrick by the disentailing assurance of June 6, 1882, appointed and assured by them to such uses as William Scarisbrick and Charles F. M. Scarisbrick should jointly appoint and in default of appointment to the use of Thomas Part and P. H. Chambres and the defendant Charles Thomas Part, their executors administrators and assigns for 900 years remainder to the use of a rent charge of 1500*l.* for Charles F. M. Scarisbrick during the joint lives of himself and William Scarisbrick remainder to the use of William Scarisbrick for life in restoration and by way of continuation of his former life estate under the will and codicil of the testator remainder to the use of Charles F. M. Scarisbrick for his life, remainder to the use of his first and other sons in tail male. The term of 900 years was to be held by Thomas Part and P. H. Chambres and the defendant Charles Thomas Part upon trust to raise 35,000*l.* for William Scarisbrick and the costs of the disentailing deed and power was given to Charles F. M. Scarisbrick to charge the real estate comprised in the William Scarisbrick share with 15,000*l.* for his own use, and the deed contained a provision that if Charles F. M. Scarisbrick should survive William Scarisbrick and have a son who should attain the age of ten years he might appoint the settled share to himself absolutely. Power was given to Charles F. M. Scarisbrick to charge a jointure and portions and power was given to the trustees to sell the real estate, the proceeds to be laid out in land to be settled upon the same uses. The personal estate so far as it was or might become subject to be laid out in the purchase of land under the will or codicil or the Scarisbrick Estate Act, 1877, was appointed to the trustees upon the same trusts as the proceeds of sales of real estate.

On January 11, 1885, Thomas Part the trustee of the testator's will died and Charles Thomas Part was appointed a new trustee in his place.

On January 28, 1904, William Scarisbrick died.

Charles F. M. Scarisbrick had two children only—namely,

the defendant Charles Ewald Scarisbrick, born in March, 1887, and who attained ten years of age, thus giving rise to the power in Charles F. M. Scarisbrick to appoint to himself absolutely, and a daughter, born August 1, 1894.

At the death of William Scarisbrick the real and personal estate and shares or share of real and personal estate which represented the William Scarisbrick share and then remained vested in the trustees of the will and codicil of the testator Charles Scarisbrick or in the trustees of the resettlement of June 7, 1882, was of great value and to a large extent consisted of (A) real estate or a share of real estate which was devised by the will and codicil or which had been purchased by the trustees thereof (under the powers therein or in the Scarisbrick Estate Act, 1877, contained) out of the proceeds of sales effected by them (under the same powers) of parts of devised real estate, (B) real estate or a share of real estate representing the proceeds of sales which had been effected by the trustees (under the aforesaid powers) of such purchased real estate as is mentioned under (A), (C) personal estate or a share of personal estate representing the proceeds of sales which had been effected by the trustees (under the aforesaid powers) of the devised or purchased real estate, and (D) capital moneys which had otherwise arisen in respect of the devised or purchased real estate.

The informant alleged that on the death of William Scarisbrick succession duty at 10 per cent. (which amounted to upwards of 20,000*l.* and was referred to as the succession duty in dispute) became payable under the provisions of the Succession Duty Act, 1853, and s. 18 of the Finance Act, 1894, upon the principal value of so much of the William Scarisbrick share as consisted of the property mentioned under heads (A), (B), (C) and (D) hereinbefore referred to.

By an indenture dated April 23, 1908 (which was duly enrolled as a disentailing assurance), and made between the defendant Charles Ewald Scarisbrick of the one part and John James Cockshott of the other part, Charles Ewald Scarisbrick disentailed in his own favour all the hereditaments and share of hereditaments in which he had an estate in tail

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male or in tail in possession legal or equitable and all moneys funds and investments liable to be laid out in the purchase of hereditaments to be settled on him for any estate in tail male or in tail in possession legal or equitable.

The informant alleged that the defendants Francis Robert Anderton and John Ernle Money as the trustees of the will and codicil of the testator Charles Scarisbrick and the defendant Charles Thomas Part as the trustee of the resettlement of June 7, 1882, were all accountable to His Majesty for the succession duty in dispute but that they respectively refused to account for or pay the same to the Commissioners of Inland Revenue.

The Crown's claim was alleged to arise under s. 18 of the Finance Act, 1894. The contention was that Charles F. M. Scarisbrick became liable to pay succession duty on the capital value of the property which came to him on the death of William Scarisbrick.

It was formulated as follows :—

1. By virtue of his power under the resettlement if he had a son who attained ten (which happened) to appoint the settled share to himself he was competent to dispose of the share.

2. His succession arose on the death of William Scarisbrick.

The claim was only made as regarded real estate. It was not made as regarded any real estate which had been purchased out of the testator's personal estate.

The informant on behalf of His Majesty prayed (inter alia) :—

1. That it might be declared that upon the death of William Scarisbrick succession duty at 10 per cent. became, under the provisions of the Succession Duty Act, 1853, and s. 18 of the Finance Act, 1894, payable upon the principal value of so much of the William Scarisbrick share as consisted of the property mentioned under heads (A), (B), (C) and (D), hereinbefore referred to, after making certain allowances and deductions which are immaterial for the purposes of this report and that the defendants (other than the defendant Charles Ewald Scarisbrick) were respectively accountable to His Majesty for the duty.

2. That an account might be directed to ascertain the amount of succession duty so payable together with interest at 3 per cent. per annum from the time when the same became payable and that the defendants Francis Robert Anderton and John Ernle Money the trustees of the will and codicil of the testator Charles Scarisbrick deceased and the defendant Charles Thomas Part the trustee of the resettlement of June 7, 1882, might be respectively ordered to pay the amount of the succession duty and interest to the Commissioners of Inland Revenue.

3. That the duty and interest might be declared to be a charge upon the property mentioned in para. 1 of this prayer or the property or share of property now representing the same or any part thereof and vested in the trustees of the will and codicil or the trustee of the resettlement or the defendant Charles Ewald Scarisbrick and that if necessary the charge might be enforced by sale or otherwise as the Court should think proper.

The defendants admitted that succession duty became payable by Charles F. M. Scarisbrick but they contended that it was payable only on the value of his interest as an annuity under s. 21 of the Succession Duty Act, 1853. The question turned on the true construction of s. 18 of the Finance Act, 1894, and was "at what date did the succession of Charles F. M. Scarisbrick arise"?

The defendants contended that by virtue of the Succession Duty Act, 1853, s. 2, it arose immediately on the death of the testator under the testator's will by virtue of which Charles F. M. Scarisbrick took an estate tail.

They contended that a succession could not arise for the purposes of s. 18 of the Finance Act, 1894, under any disposition which took effect before the death of the deceased (i.e., William Scarisbrick) and that a succession could only arise on the death of a deceased within that section where the deceased himself is the person from whom the succession is derived either by his will or by his intestacy.

Sheldon (*Sir Gordon Hewart A.-G.* with him) for the

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informant. The question is whether the payment of the succession duty is on the capital value of the succession under s. 18 of the Finance Act, 1894, or the succession as on an annuity from the predecessor. Under the Succession Duty Act, 1853, the duty is calculated on the value of the successor's interest. Sect. 18 of the Finance Act, 1894, altered the mode of valuation of the interests of successors who are competent to dispose of the property to which they succeed upon any death occurring after August 1, 1894, and the succession is to be valued on a capital basis instead of " the value of an annuity equal to the annual value of such property . . . . payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto " under s. 21 of the Succession Duty Act, 1853. The defendant Charles Ewald Scarisbrick is not personally liable but is brought in as the owner of the property in respect of which duty is payable. The trustees are asked by the Crown to pay succession duty under s. 18 of the Act of 1894 as on the death of William on the capital value of the succession of Charles, not on the succession of Charles valued as an annuity under s. 21 of the Succession Duty Act, 1853. For the purpose of succession duty this is a succession arising on the death of William, and the successor Charles was competent to dispose. The word " arising " in s. 18 of the Act of 1894 is not particularly apt to the definition in s. 1 of the Succession Duty Act, 1853, of a succession as property. It is not used in the Act of 1853 in relation to succession even in ss. 5 and 7. It is used in ss. 29 and 42 in reference to monies arising from the sale where it is applicable. It was probably taken from *Attorney-General* v. *Robertson* (1) where it occurs in the judgment of Lord Esher M.R. The word " succession " in the Succession Duty Act, 1853, is not used in the popular sense of a succession to property, but is defined in s. 1 of the Act as denoting " any property chargeable with duty under this Act." Sect. 2 is the changing section and logically follows

(1) [1893] 1 Q. B. 293, 299.

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up the definition. In s. 18 of the Finance Act, 1894, the word is used in the popular sense. Under that section the succession arises under any disposition whether a will or not, on the death of a person. Whenever a person dies who is in the line of succession under a disposition, then a succession arises under s. 18 of the Act of 1894 to the successor.

By s. 24 of the Act of 1894, s. 18 came into force on the expiration of August 1, 1894. It is very improbable that it could have been intended by s. 18 of the Act of 1894 to tax successions under a testacy or an intestacy only and not to tax successions under dispositions whether made before or after the operation of the Act of 1894. In s. 58 of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8) (which by s. 96, sub-s. 3, of the Act of 1910 is to be construed together with the Finance Act, 1894, as it is included in Part III. of the Act of 1910), sub-ss. 3 and 4, the words " arises " and " arising " occur and the word " arising " in sub-s. 4 is used with reference to dispositions inter vivos. That throws some light on the meaning of the word in the Act of 1894. If succession means property, then " arising " means when the property becomes pro hac vice property chargeable with succession duty. It is true it became chargeable in one sense in prospect at the moment when the disposition was made, but it becomes immediately chargeable when the death occurs. It is not to be valued as at the date when the property originally becomes chargeable on the execution of the disposition but when on each occasion a charge comes into being or into actual enforceability or arises.

Upjohn K.C. and *Ashworth James* for the defendants. Sect. 18 of the Finance Act, 1894, does not create or impose any new tax or duty or alter the duty imposed by the Succession Duty Act, 1853. It merely amends the Act of 1853 by altering in a particular case the mode in which the duty imposed by that Act is to be assessed. It amends s. 21 of that Act under which the interest of a successor was to be considered as the value of a certain annuity and the tax to be imposed accordingly. The word " succession " in s. 18

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of the Finance Act, 1894, has the same meaning as "succession" as defined by s. 1 of the Act of 1853. That section contains a definition of "real property," "personal property" and "property." Sect. 18 of the Finance Act, 1894, contains the expression "real property." In the Succession Duty Act, 1853, s. 1, "succession" is defined as denoting any property chargeable with duty under the Act, and that word in s. 18 of the Act of 1894 is capable of receiving exactly the same interpretation, and with that interpretation the section is perfectly sensible though more limited in meaning than the Crown contends. But the Act of 1894 is a taxing Act and its meaning is not to be extended beyond the plain meaning of the words used. The words "succession to real property" in s. 18 of the Act of 1894 mean succession in respect of real property and not of personal property.

In *Attorney-General* v. *Robertson* (1) Lindley L.J. said that the term "succession" as used in the Succession Duty Act, 1853, "appears to be really equivalent to property chargeable with duty, of whatever it may consist, but it also includes an increase of benefit, as is shown by several sections, particularly ss. 5. and 7." By s. 5 of the Act of 1853 "the increase of benefit accruing to any person or persons . . . . shall be deemed to be a succession." There it is not an event which is deemed to be a succession, but the increase of benefit. A succession means something to which title is derived under the original disposition, or, in the case of an intestacy, under devolution by law, but it never means event. It is the original disposition which gives the title to the succession, not the mere event of some one dying and the interest in the succession becoming an interest in possession. Sect. 2 of the Succession Duty Act, 1853, shows that in the present case the succession had arisen within the meaning of s. 18 of the Finance Act, 1894—that is, the title to the property had arisen—before the Act of 1894 came into operation, for the will of the testator Charles Scarisbrick which spoke from his death in 1860 was the disposition of property which gave the

(1) [1893] 1 Q. B. 293, 301.

title to the succession. It was a disposition of property by reason whereof Charles F. M. Scarisbrick became beneficially entitled to the property on the death of his father, William Scarisbrick. The will therefore conferred a succession upon him. Therefore the succession of Charles F. M. Scarisbrick to real property on the death of his father William did not, within the meaning of s. 18 of the Finance Act, 1894, arise on the death of William. It arose on the death of the testator Charles Scarisbrick in 1860 and nothing happened afterwards to give him a new succession. All that happened was that when his father William died in 1904 he became entitled in possession to his succession and on that event duty became payable as imposed by the Succession Duty Act, 1853. Sect. 18 of the Finance Act, 1894, is made perfectly sensible and consistent with the Act of 1853 if it is confined to the case of a person becoming entitled to his succession on the death of a predecessor, whether under his will or under an intestacy, where the death of the predecessor happens after August 1, 1894. That may be a very limited interpretation, but if the words of s. 18 of the Act of 1894 seem to bear it when placed in collocation with s. 21 of the Succession Duty Act, 1853, the principle expressed by Hamilton J. in *Attorney-General* v. *Peek* (1) that taxing Acts are to be construed strictly ought to be applied.

In s. 58, sub-s. 3, of the Finance Act, 1910, the word "succession" has the same meaning as in the Succession Duty Act, 1853. The words "first succession" are elliptical. They mean "when the interest in the succession first becomes an interest in possession."

[*Wolverton* v. *Attorney-General* (2) and ss. 14, 27 and 41 of the Succession Duty Act, 1853, were also referred to.]

ROWLATT J. I have formed a clear view upon this troublesome matter and it is unnecessary for me to refer to all the sections which have been commented on by both sides in order to illustrate the arguments which have been placed before me. The question turns upon the meaning of s. 18

(1) [1912] 2 K. B. 192, 208. (2) [1898] A. C. 535.

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of the Finance Act, 1894, but in order to appreciate the point it is necessary to consider the Succession Duty Act, 1853. It is well known that in that statute the phraseology is used very exactly. It is commonplace that the statute is extremely well drafted and the value of the words used in it is maintained with remarkable consistency throughout, and it is a statute which always needs reading very closely. Under s. 1 "succession" is defined as denoting "any property"—and "property" includes real and personal property—"chargeable with duty under this Act." "Succession" denotes property, not an event. That is quite clear. By s. 2 "every past or future disposition of property" and "every devolution by law of any beneficial interest in property" which effects changes of possession by reference to death "shall be deemed to have conferred"—that is a case of the past—"or to confer" —that is a case of the future—"on the person entitled by reason of any such disposition or devolution a 'succession.'" The disposition or the devolution confers the interest which a person obtains. The interest which he obtains is the succession, not the event of his coming into his patrimony. Sect. 10 deals with the duties and enacts that "There shall be levied and paid . . . . in respect of every such succession . . . . according to the value thereof, the following duties"; and it then sets them out. Therefore there is to be a duty upon the value of property which a person takes under the name of a succession, according to the nomenclature of this Act, under a disposition such as I have referred to. Sect. 20 provides that the duty is to be paid on the successor becoming entitled in possession—not succeeding, but becoming entitled in possession—to his succession, thus maintaining accurately the artificial meaning of the word "succession." Sect. 21 provides, in the case of real property, for the valuation of the taxable subject-matter, namely, the succession, which is here called—and I do not think it is merely an alternative way of describing the same thing—the interest of the successor. Those sections, for the present purpose, give one a general scheme of the Act, and so far there is not the least doubt as to what the

word "succession" means. It does not mean the act of succeeding.

But I have now to construe the Finance Act, 1894, and to find out the meaning of that statute. If—without stretching it in favour of the Crown—I find that I have to come down to the level of some degeneracy of language, I must do so if that is the meaning of the statute. I conceive that to be my duty, and I think there has been a shifting of the meaning of the language employed.

First, let me look broadly at s. 18 of the Act of 1894. That section alters the value for the purpose of the payment of succession duty. It amends s. 21 of the Succession Duty Act, 1853. Payment of the duty takes place on a death, on a passing of the property, on a coming into possession of the person entitled to the succession, and certainly, prima facie, one would expect the system of valuation to be changed by reference to the occurring of the event on which duty becomes payable. One would not expect it, at any rate, to be altered by reference only to a certain form of disposition or devolution, a certain form of conferring a succession—namely, a form which takes effect upon death—i.e., a will or a devolution by death, and that only in the case where it occurs after a particular date. But if that is the effect, and only that, the section must not be read as meaning more merely because one expected more. Having said that, and having regard to the language of the section itself, I do not think it is possible to read it as I am asked to do by counsel for the defendants without doing some violence to the language—as much violence as to read it in the way that counsel for the Crown suggests, if not more. The words of the section are: "The value for the purpose of succession duty of a succession to real property"—i.e., the value of a succession to real property. Now the value must be the value of a thing, and the draftsman was apparently appreciating that the value of the succession was the interest coming into possession. But there are the words "succession to real property." When the draftsman used these words he could have had no possible idea in his mind other than the act of succeeding—

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coming after another person—because succeeding to property can only mean coming into possession of it when some one else abandons it by death. Therefore the opening words of this section seem to me necessarily to deal with the value of the coming into possession of real property being a "succession" within the meaning of the Succession Duty Act, 1853.

Then come the words "arising on the death of a deceased person." Now if succession means, as it does in the Act of 1853, the property liable to the duty, it certainly does not arise at all. If it means the interest in property it arises in the sense of being created when the disposition is made, it arises in the sense of coming into possession when the death on which it passes happens. But it seems to me that as s. 18 of the Act of 1894 amends s. 21 of the Act of 1853 I am bound to hold that the words in it "succession to real property arising on the death" must mean the interest entered upon in possession by succeeding to a succession in real property on the death of a deceased. It is a thousand pities that the draftsman of s. 18 of the Act of 1894 did not amend by taking the words of s. 21 of the Act of 1853 and altering the consequence. It is a pity he did not use the words "The interest of every successor shall be valued differently from the manner provided in s. 21 in the Act of 1853 in the following respect." It is a pity he did not employ the words "the interest of every successor," but he has used as the words of description of the thing the value of which is altering "a succession to real property arising on the death," although it seems to me that the words "the interest of a successor arising on the death" would not have been very difficult to construe. Under those circumstances I am of opinion that the claim of the Crown is right upon the meaning, which is I think rather special, of the words in s. 18, because I can give no other meaning to them. I do not refer to the use of the word "arising" in connection with "succession" in s. 58, sub-s. 3, of the Finance (1909–10) Act, 1910, where perhaps still further degeneracy may be observed, because I do not think that that section really bears upon the question, but obviously we are in the presence

of a slight change in the value of language between 1853 and 1894. My duty is to find out what s. 18 of the Act of 1894 means. I have come to a conclusion and my judgment is that upon this information the Crown is entitled to the declaration it asks for.

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Declaration accordingly.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendants: *R. S. Taylor, Son & Humbert.*

J. E. A.

ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY), INFORMANT *v.* CHAMBRES AND OTHERS, DEFENDANTS.

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July 28.

Revenue—Succession Duty—Tenant for Life and Remainderman—Appropriation of Property before coming into Possession by Remainderman of Succession—Payment under Order of Court—Liability of Trustees—Succession Duty Act, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 10, 20, 44, 45.

Sect. 10 of the Succession Duty Act, 1853, sets out the scale of duties on "successions" and s. 20 provides that the duty is to be paid on the successor becoming entitled in possession to his succession.

By s. 44: "The following persons, besides the successor, shall be personally accountable . . . . for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively . . . . that is to say, every trustee . . . . in whom . . . . any property . . . . subject to such duty, shall be vested . . . . at the time of the succession becoming an interest in possession; and all such trustees . . . . shall be authorized to . . . . commute any duty . . . . and in the event of the non-payment of such duty as aforesaid every person hereby made accountable shall be a debtor" to the Crown "in the amount of the unpaid duty for which he shall be so accountable."

By s. 45: "The persons hereby made accountable for the payment of duty in respect of any succession . . . . shall . . . . in the case of real property when any duty in respect thereof shall first become payable give notice to the Commissioners . . . . of their liability to such duty, and shall . . . . deliver to the Commissioners . . . . a full and true account of the property . . . . and of the value thereof. . . . ."

By his will and a codicil thereto a testator who died in 1860 (inter alia) settled one undivided third part of his real estate upon his eldest son William for life with remainder to his first and other sons in tail male. William's eldest son Charles was born in 1860 and attained the age of twenty-one in 1881.

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In 1882 a disentailing assurance was executed by which one undivided third part of the freehold lands of which Charles was the first equitable tenant in tail were disentailed and conveyed to such uses as William and Charles should jointly appoint, and by a deed of resettlement made on the following day the lands were under the joint power contained in the disentailing assurance conveyed to such uses as they should jointly appoint.

In 1883 and 1884 35,425*l.* was in pursuance of an order made in a suit for the administration of the testator's estate paid by the then trustees of the will and codicil to William, the proportion attributable to proceeds of sales of real estate subject to the will and codicil being 7081*l.*

Between 1898 and the death of William (which took place in 1904) William and Charles in exercise of the joint power of appointment vested in them by the resettlement, appointed to themselves investments and cash attributable to the proceeds of real estate amounting in the aggregate to 26,718*l.* Succession duty in respect of Charles' succession had not been paid on either the 7081*l.* or the 26,718*l.* :—

Held, that the order of the Court under which the trustees paid the 7081*l.* did not protect them from liability for succession duty in respect of that sum.

Held, further, that, upon the death of William, succession duty became payable in respect of Charles' succession on 33,799*l.* (the aggregate of the sums of 7081*l.* and 26,718*l.*), and that the trustees or their personal representatives were liable for the duty in respect of so much of those sums as was paid by the trustees respectively or to the payment of which they were parties.

INFORMATION filed by the Attorney-General on behalf of His Majesty.

This was a claim by the Crown against the trustees respectively of the will and codicil of the testator Charles Scarisbrick (1) and also those of the resettlement of June 7, 1882 (1), and their personal representatives for succession duty arising on the death of William Scarisbrick in 1904 in respect of two sums of money together amounting to 33,799*l.* representing proceeds of real estate which under the resettlement were appropriated by William and Charles F. M. Scarisbrick or one of them.

The first was a sum of 7081*l.* being a part of a larger sum of 35,425*l.* raised under the term of 900 years created by the resettlement and paid to William Scarisbrick.

The second was a sum of 26,718*l.* which represented the proceeds of real estate from time to time appointed by

(1) See statement of facts in *Attorney-General* v. *Anderton*, ante, p. 160.

William and Charles F. M. Scarisbrick to themselves under the joint power in the resettlement.

Duty was claimed against the trustees for the time being who were parties to the payment of the 7081*l.* and 26,718*l.* or any part of those sums in respect of so much of those sums respectively as was paid to William or Charles F. M. Scarisbrick.

The duty was claimed at 11½ per cent. being as to 10 per cent. succession duty under the Succession Duty Act, 1853, s. 10, and as to the 1½ per cent. residue the additional duty under the Customs and Inland Revenue Act, 1888, s. 21, sub-s. 1.

The following statement of material facts is by way of supplement or addition to the statement of facts in *Attorney-General* v. *Anderton* (1) :—

William Hawkshead Talbot a trustee of the testator's will and codicil died on October 15, 1875, and by an order of the Court dated July 15, 1876, Philip Henry Chambres and the defendant Charles Thomas Part were appointed trustees of the will and codicil in the place of William Hawkshead Talbot and jointly with Thomas Part, the real and personal estates subject to the trusts of will and codicil being thereby vested in Thomas Part, Philip Henry Chambres, and Charles Thomas Part upon the trusts of the will and codicil.

In the years 1883 and 1884 the sum of 35,425*l.* was in pursuance of an order which was on April 28, 1883, made in the suit of *Talbot* v. *Scarisbrick* partitioned and appropriated out of the trust estate subject to the trusts of the will and codicil of the testator to the William Scarisbrick share and was, in compliance with the terms of the order, paid by the trustees of the will and codicil to William Scarisbrick.

The terms of the order (so far as relate to the payment of the 35,425*l.*) were : "And it is ordered that . . . . the present trustees of the said will and codicil do transfer and pay to the defendant William Scarisbrick for his own absolute use or as he shall direct the" sum of 35,425*l.*, that

(1) Ante, p. 160.

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sum being made up of the sum of 35,000*l.* mentioned in the resettlement and the costs and expenses which were to be raised under the term of 900 years and which last-mentioned costs and expenses had been paid by William Scarisbrick. By a deed poll dated January 7, 1885, under the hand and seal of William Scarisbrick, William Scarisbrick released Thomas Part and Philip Henry Chambres and the defendant Charles Thomas Part, respectively, as trustees of the resettlement from all actions claims and demands in respect of the 35,000*l.* or the costs and expenses. The proportion of the 35,425*l.*, attributable to proceeds of sales effected by the trustees of the will and codicil (under the powers therein or in the Scarisbrick Estate Act, 1877, contained) of real estate subject to the trusts of the will and codicil other than real estate purchased out of or otherwise representing personal estate of the testator (which proceeds of sales of real estate other than as aforesaid are hereinafter for convenience referred to as "proceeds of real estate") amounted to 7081*l.*

Thomas Part died on January 11, 1885, and the defendant Charles Thomas Part was his legal personal representative.

By an indenture dated May 7, 1885, and made between Philip Henry Chambres of the first part the defendant Charles Thomas Part of the second part and Christopher Lethbridge of the third part Christopher Lethbridge was (in pursuance of an order in the same suit of *Talbot* v. *Scarisbrick* dated April 27, 1885) duly appointed a trustee of the will and codicil of the testator in the place of the defendant Charles Thomas Part who desired to be and was thereby discharged from the trusts of the will and codicil and jointly with Philip Henry Chambres. And by the indenture or other appropriate means the real and personal estate subject to the trusts of the will and codicil was duly vested in Philip Henry Chambres and Christopher Lethbridge upon the trusts of the will and codicil.

By an order in the suit dated July 20, 1899, Robert Legh Crosse was appointed an additional trustee of the will and codicil of the testator in addition to Philip Henry Chambres

and Christopher Lethbridge and the trust estate was duly vested in Philip Henry Chambres, Christopher Lethbridge and Robert Legh Crosse upon the trusts of the will and codicil.

Between the year 1898 and the death of William Scarisbrick, William Scarisbrick and Charles F. M. Scarisbrick, in exercise of the joint power of appointment which was vested in them by the resettlement, appointed in favour of themselves various investments and sums of money which had, under orders of the Court in the suit of *Talbot* v. *Scarisbrick*, been partitioned and appropriated to the William Scarisbrick share out of the trust estate subject to the trusts of the will and codicil of the testator. The whole of those investments and cash were from time to time transferred and paid by the trustees of the will and codicil to the trustees of the resettlement and were by the latter transferred and paid to and between William Scarisbrick and Charles F. M. Scarisbrick in accordance with the provisions and directions contained in the various instruments of appointment. The proportionate parts of the respective investments and cash which were attributable to proceeds of real estate amounted in the aggregate to 26,718*l.*, making with the sum of 7081*l.* the sum of 33,799*l.*

Robert Legh Crosse died on July 3, 1907, and the defendant Thomas Hinton Campbell was his legal personal representative.

Philip Henry Chambres died on August 31, 1909, and the defendants Henry Chambres Chambres, Edward Lloyd Chambres and Edgar John Swayne were his legal personal representatives.

Christopher Lethbridge died on July 11, 1910, and the defendants Mary Ann Lethbridge and Thomas Henry Crozier were his legal personal representatives. The succession duty in dispute had not been paid.

The information alleged that the defendants were accountable to His Majesty for the succession duty in dispute as follows :—

(I.) The defendants Henry Chambres Chambres, Edward

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Lloyd Chambres and Edgar John Swayne as the legal personal representatives of Philip Henry Chambres a former trustee of the will and codicil of the testator and also of the resettlement were accountable for the whole of the succession duty in dispute.

(II.) The defendant Charles Thomas Part as a former trustee of the will and codicil and also as legal personal representative of Thomas Part a former trustee of the will and codicil was accountable for so much of the succession duty in dispute as was attributable to the 7081*l.* and as a trustee of the resettlement was accountable for the whole of the succession duty in dispute.

(III.) The defendants Mary Ann Lethbridge and Thomas Henry Crozier as the legal personal representatives of Christopher Lethbridge a former trustee of the will and codicil were accountable for so much of the succession duty in dispute as was attributable to the 26,718*l.*

(IV.) The defendant Thomas Hinton Campbell as the legal personal representative of Robert Legh Crosse a former trustee of the will and codicil was accountable for so much of the succession duty in dispute as was attributable to that portion of the 34,434*l.* 13*s.* 4*d.* which was paid or transferred after the date of the appointment of Robert Legh Cross as a trustee of the will and codicil.

The informant on behalf of His Majesty prayed (inter alia) :—

(1.) That it might be declared that upon the death of William Scarisbrick succession duty at 11½ per cent. became under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, payable upon the principal sum of 33,799*l.* and that the respective defendants were to the extent mentioned above accountable to His Majesty for the duty.

(2.) That an account might be directed to ascertain the amount of succession duty so payable together with interest at 3 per cent. per annum from the time when the same became payable and that the respective defendants might be ordered to pay to the Commissioners of Inland Revenue

the amount of the succession duty or the proportion thereof for which they were respectively accountable and interest.

Sheldon (*Sir Gordon Hewart A.-G.* with him) for the informant. The resettlement of 1882 constituted a disposition made by Charles F. M. Scarisbrick within the meaning of s. 12 of the Succession Duty Act, 1853. He was, under the testator's will, entitled to an estate tail in remainder expectant on William's death. This estate was by the disentailing deed converted into a fee simple and by the resettlement that fee simple estate which belonged to Charles F. M. Scarisbrick was resettled by him to uses under which he took upon the death of William an estate for life with remainder to his first and other sons in succession in tail male. He therefore took a succession—i.e., property chargeable with succession duty—under a disposition made by himself and at the date of the disposition he would have been entitled to the property comprised in that succession expectant on the death of William who subsequently died during the continuance of that disposition—namely, the resettlement. Charles F. M. Scarisbrick was accordingly chargeable on the death of William with duty on his succession at the same rate as he would have been chargeable with if the resettlement had not been made—i.e., at 10 per cent. as being the successor to the testator as predecessor. Under s. 44 the trustees of the resettlement for the time being and their personal representatives are equally liable. The trustees who paid the money from time to time are liable under s. 44 of the Succession Duty Act, 1853, because they have paid the money without seeing that succession duty was commuted under s. 41 or otherwise dealt with. The claim to the duty arises on the death of William. These sums ought to have been in the settlement. They were chargeable with succession duty as from the time of the death of the testator, and instead of remaining at the death of William they had been disposed of between the two persons entitled. Before the trustees paid the money they ought to have seen that the succession duty was commuted,

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or have kept sufficient of the money to pay the duty. Of the 35,000*l.* only 7081*l.* was paid out of the proceeds of the real property of the testator. So far as it was paid out of personal estate no duty is claimed, because probate duty was paid on the testator's death and that covered it. Succession duty is only claimed on that part of the money which represented real estate of the testator. The trustees for the time being or their personal representatives are liable in respect of such monies as were paid during the time they were trustees. The persons who were absolutely entitled said: "We will take the money out of settlement and keep it ourselves," as they were entitled to. It was personal estate and therefore pays duty on the capital value.

Upjohn K.C. and *Ashworth James* for the defendants. The trustees and representatives of deceased trustees being the only defendants, the only question is as to the liability, if any, of the trustees. As to the 7081*l.* it was paid by the then trustees of the will and codicil of the testator to the defendant William Scarisbrick under the order of the Court dated April 28, 1883. That order is a complete indemnity to them. Under s. 53 of the Succession Duty Act, 1853, it was the duty of the Court to provide for the duty out of the property which was in Court. Where there is an administration action and there are creditors and legatees but the existence of a certain debt is unknown to the Court, if the Court orders the executors to pay the legacies and they do so, they cannot be sued on the footing of a devastavit. The answer would be that they acted on the order of the Court and their act must be held good: *Gillespie* v. *Alexander* (1); *Dean* v. *Allen*. (2)

As to the 26,718*l.* the defendants have not the defence that it was paid under an order of the Court and the question is whether they are liable under the provisions of ss. 44 and 45 of the Succession Duty Act, 1853. William and Charles F. M. Scarisbrick were able by the exercise of the joint power which obliterated William's life estate to make a title in possession, but the succession had not come into

(1) (1827) 3 Russ. 130. (2) (1855) 20 Beav. 1, 4.

possession and the trustees are therefore not within the provisions of s. 44 of the Succession Duty Act, 1853, which only applies where trustees have property vested in them "at the time of the succession becoming an interest in possession." At the time the trustees made the payments the duty was not payable. Before the succession arose within the meaning of s. 18 of the Finance Act, 1894 —i.e., before the death of William—it is true that the trustees parted with money on the joint receipt of the tenant for life and remainderman, but no duty had been then assessed. They are therefore not liable under s. 18 of the Act of 1894.

William and Charles F. M. Scarisbrick who had the joint power of appointment joined together to divide the fund between themselves at once before the date when in the ordinary case the succession would open to Charles F. M. Scarisbrick. The result was that William took as alienee of Charles a part of Charles' succession in his own lifetime, and Charles took the part of the fund allotted to him by acceleration because William surrendered his life interest. Therefore under s. 15 of the Succession Duty Act, 1853, the duty was payable at the same rate and at the same time as if the alienation and acceleration respectively had not taken place, and by s. 20 the duty imposed by the Act shall be paid when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession. Therefore the payment or liability to pay the duty was not accelerated either by William surrendering to Charles or by Charles' assignment to William. It remained payable and was ascertainable for the first time at the death of William. Therefore no duty was payable when the fund was distributed. Sect. 42 imposes the duty as a first charge when it has been assessed as against the beneficial successor and trustees for him. The duty is not assessed until it is payable, that is until the succession has ripened into possession. It then becomes a chargeable property and remains so in whosever hands it is. No personal liability is created until the succession has ripened into

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possession. Under s. 44 the first time any personal liability attaches is "at the time of the succession becoming an interest in possession." The trustee only becomes liable when he becomes entitled in right of a successor who himself has become personally liable and the successor only becomes personally liable when the duty has been assessed on his interest ripening into possession. If that were not so, if every trustee in whom a succession—that is, property disposed of by a testator or settlor—is vested, to the extent of the property received or disposed of by him, is personally liable for the duty at some unknown future rate, no one would be willing to be a trustee. A trustee would always require an indemnity against future duty, which could not possibly be given. What the future liability might be could not be known and the trustee could never be free of the trust. That would defeat the whole administration of trusts and cannot have been the intention of the Act of 1853. The trustee under s. 44 is a trustee for the successor, not a trustee of the fund generally. He is a trustee for the person who has become personally accountable and he is made equally personally liable at the same date. If therefore before any duty is payable the funds are in fact divided, the Crown must look to the persons who in fact have the funds.

Sheldon in reply. If the contention on behalf of the defendants that the trustees can hand over the property to the persons entitled to it without making any provision for the succession duty is upheld, the theory upon which the Succession Duty Act, 1853, has always been worked—namely, once a succession always a succession—will be completely upset. It has always been considered that the succession duty was a charge on the property, and the practice has been that when there is a sale of property chargeable with succession duty provision is ordinarily made to meet the claim for duty when it arises. If a trustee retires and a new trustee is appointed, succession duty is charged on the property just as it was before the retirement. The retiring trustee has incurred no liability and the property

remains in the hands of the new trustees charged as before. But if the new trustees choose to part with it to persons who become entitled to it subject to the charge of which the new trustees are perfectly aware, they become liable under s. 44 of the Succession Duty Act, 1853, for the succession duty which they must discharge when it becomes payable. The trustees are accountable and they send in their account, not the successor's, where the property is in their hands and they are liable. In the present case the trustees ought to have said as regards William: "We must wait until the succession of Charles takes place to see what the duty will be. We cannot pay this fund over to you, because it is charged with duty the amount of which we cannot ascertain for the moment." William could then have requested them to get the duty commuted and if the Commissioners refused, the trustees ought to have retained a sufficient amount to meet the duty. If they refused to pay over anything to the persons entitled until the duty was payable or commuted, no Court would compel them to pay the beneficiaries until that time. As a matter of practice the Commissioners never refuse to commute. The Act of 1853 charges the successions as they arise. If Charles had sold his remainder, the purchaser from Charles would have been the successor: *Duke of Northumberland* v. *Attorney-General.* (1) As to the effect of the order of the Court under which the 7081*l.* was paid the Crown was not a party to it and is not bound by it. The trustees ought to have drawn the attention of the Court to the fact that succession duty was a charge on the property and to have asked it to make provision for it in the order. Under s. 25 of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), it was held in *Bowra* v. *Rhodes* (2) that an executor paying a tenant for life in full under an order of the Court was not indemnified out of the estate on the death of the tenant for life. See also *In re Webber.* (3) If the Court makes an order but being misled by a party to the suit does not provide in accordance with

(1) [1905] A. C. 406. (2) (1862) 10 W. R. 747.
(3) [1896] 1 Ch. 914.

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s. 53 of the Succession Duty Act, 1853, for the duty, there is no justification for saying that the Crown who is not a party to the suit loses the duty.

ROWLATT J. In this case the main question is whether trustees of a settlement or a will at the date or dates when moneys subject to the trusts of the will were taken out of settlement by the concurrence of the tenant for life and remainderman are now liable for the succession duty which was payable in respect of the remainderman's succession. The death of the tenant for life took place in 1904 and the payments were made before that year, so that they took place long ago and it is certainly a matter of some hardship to the trustees. But notwithstanding the ingenious argument which has been addressed to me on their behalf there is, in my judgment, no answer to the claim made by the Crown. The liability to succession duty attaches to the future interest. It is a charge which cannot be got rid of. It becomes payable when the interest comes into possession, and at the rate which the law may then ordain, and the time and the rate are not altered by any dealings with the interest whatever they may be. By s. 44 of the Succession Duty Act, 1853, it is enacted that "every trustee . . . . in whom . . . . any property, or the management of any property, subject to such duty, shall be vested . . . ." is accountable. Now it seems to me that the trustees at the time the payments by them took place had the property vested in them subject to the duty, not yet payable, the amount of it not even yet ascertainable, but subject to the duty, beyond possibility of escape, however it was dealt with. On behalf of the defendants it was contended by way of reductio ad absurdum that if any such transaction as this had taken place, but before the date of the transaction the trustees had retired from the trust and had given way to new trustees who would carry on the trust as a continuing trust, that on the argument of the Crown those retiring trustees would be liable for all time for the duty. But I do not think that is the way the statute works. It

seems to me that the position is that if trustees, having funds in their hands subject to the duty payable in the future—i.e., when the future interest becomes an interest in possession—continue to be trustees until that time they will have become liable to pay the duty. If they retire before that time they are free from any liability, but if they are parties to a transaction which puts an end to the future contingencies by dividing the funds before the contingencies happen it follows from the accountability under which they are, that they must make provision for the liability, the proper and normal discharge of which is prevented by an arrangement to which they are parties.

A further point was raised as to the 7081*l.* which was part of a fund in Court in an administration action. The 7081*l.* was paid under an order of the Court that the trustees should pay out the funds of which the 7081*l.* formed part, and it was contended on their behalf that that order protects them against any liability for making the payment in obedience to it. In my judgment the order does not protect them. Certain authorities were cited in argument where executors paid legacies under the order of the Court, the Court taking upon itself to be satisfied that there were no outstanding debts, although the executors would not be protected if they concealed any facts from the Court. The Court in those cases said, in effect: "Distribute these funds," and the executor was entitled to distribute the funds subject to debts, and the answer to a charge that he had committed a devastavit would be that the Court said: "You shall not say that the executor devastated; the executor did not devastate because the Court authorised him and told him to do it." But the present case is entirely different, because the fund was in Court and the Court was asked to make an order sanctioning its disposal. The trustees must have known—as a matter of law they were bound to know—that there was this "ineluctabile fatum," the succession duty, and that it would certainly become payable. It was not a question whether a certain debt existed or not; it would inevitably become payable and the trustees were bound to see that proper

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provisions were put into the order of the Court. Probably it was thought that other funds would be quite sufficient to protect them. If that is so they had nothing to complain of. They were not ordered by the Court to pay without making provision for the duty. They did it with their eyes open and took the risk. Where an order of this kind is made and the parties come before the Court with the obvious liability to succession duty and take an order in a certain form it is impossible for the trustees to say, "This is the act of the Court by which we are indemnified and not an act of the Court to which we were parties, taking the risk."

In my judgment therefore the Crown is right on both points and must have the judgment it asks for. The result is that I hold that the trustees or their personal representatives are liable for the acts which were done by the trustees respectively or to which they were parties.

Judgment for Crown.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendants: *R. S. Taylor, Son, & Humbert.*

J. E. A.

[IN THE COURT OF APPEAL.]

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BARWICK AND OTHERS *v.* SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES.

[1917. B. 1202.]

Poor Rate—Pier—Rateability—"Accretion"—Declaration of Liability—Jurisdiction of High Court—Poor Law Amendment Act, 1868 (31 & 32 *Vict.* c. 122), *s.* 27—*Rules of Supreme Court, Order* XXV., *r.* 5.

By s. 27 of the Poor Law Amendment Act, 1868, "Every accretion from the sea, whether natural or artificial .... shall for the same purposes"—i.e., all civil parochial purposes—"be annexed to and incorporated with the parish to which such accretion .... adjoins."

A harbour board under the powers of a special Act reclaimed from the sea certain land below low-water mark for the purpose of making thereon a railway station. The reclamation was effected by building masonry walls round the land and filling up with chalk the area thus enclosed. By the terms of the special Act the Harbour Board was required to grant a lease of the reclaimed land to the defendants. Upon the outbreak of the war in 1914, and before any lease was granted to the defendants, the Government took possession of the reclaimed land. The Government were ready to make a payment in lieu of rates to the overseers of the poor of the adjoining parish, if certified that the land was part of that parish. In 1917 while the Government were still in possession of the land, the then overseers of the adjoining parish brought an action in the High Court against the defendants claiming a declaration that the reclaimed land was part of that parish for all civil and parochial purposes within the meaning of s. 27 of the above Act:—

Held, (1.) that the High Court had jurisdiction to make the declaration, notwithstanding that its effect was to establish a liability which could be enforced only in a Court of summary jurisdiction, and notwithstanding that the defendants were not the occupiers of the land at the date of the writ; (2.) that the reclaimed land was an "accretion from the sea" within the meaning of s. 27 of the Act, and so formed part of the plaintiffs' parish.

Judgment of Darling J. [1920] 2 K. B. 387 affirmed.

APPEAL from the judgment of Darling J. (1)

The Dover Harbour Board acting under powers conferred by the Dover Harbour (Works, &c.) Act, 1906 (6 Edw. 7, c. ccv.), reclaimed from the sea certain land eleven or twelve acres in extent immediately adjoining the east side of the existing Admiralty Pier. The whole of the land so reclaimed

(1) [1920] 2 K. B. 387.

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was below low-water mark. The object of the reclamation was to effect a widening of the Admiralty Pier, in order to allow of a railway station and sidings being constructed on it. The reclamation was effected by means of the erection of solid masonry walls and by filling in the intervening space between the walls with chalk. By the terms of the Act the Board was to grant a lease of the land to the defendants as soon as certain works to be executed thereon were so far completed as to be capable of being used as a railway approach, station, and depot. The contemplated lease was not in fact granted to them till June, 1919. On the outbreak of the war in 1914 the Government took possession of the site and used it as a station for landing wounded soldiers, and continued in occupation of it throughout the war. In 1916 the overseers of the poor of the parish of Dover made a supplemental valuation list which included the land in question, and in which the defendants were stated to be the occupiers. The defendants objected to the valuation list upon the grounds that the land was not within the parish of Dover, and that they were not in beneficial occupation of it. The overseers then made an application to the Government for a contribution in lieu of rates in respect of the Government occupation; but the Government declined to make any contribution until it was settled that the property would be rateable if it were in the occupation of a subject, and suggested that proceedings should be taken to determine that question. Accordingly on May 15, 1917, the plaintiffs, who were then the overseers of the parish of Dover, brought this action against the defendants for a declaration that the reclaimed land was part of the parish of Dover for all civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868. (1)

Darling J. gave judgment for the plaintiffs.

The defendants appealed.

(1) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27: "Every accretion from the sea, whether natural or artificial . . . . which on the said twenty-fifth day of December next shall not be included within the boundaries of or annexed to and incorporated with any parish, shall for the same purposes"—i.e., all civil parochial

Disturnal K.C. and *Scholefield* for the appellants. This action is not maintainable. It is brought with the object of establishing the liability of the appellants to pay rates in respect of the reclaimed land and the buildings upon it. Their liability to pay rates can only be established by a special course of procedure. The names of occupiers in a particular parish are placed upon a valuation list; then any person desiring to appeal gives notice of objection to the valuation list; if he fails to obtain such relief as he deems just, he gives twenty-one days' notice in writing of appeal to special or quarter sessions against the rate of which he complains: Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1. In this way the liability of the occupier is established. There is also a special statutory method of enforcing the liability. The money due for rates cannot be recovered as a debt. It is recovered by a process of execution, "by distress and sale of the offender's goods": Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4; Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 7; and in default of distress justices may issue a warrant of commitment: Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2.

This being so there are two objections to this claim for a declaration. First, the High Court not having jurisdiction in the way either of imposing or enforcing the liability will not make a declaration regarding it, but will leave both matters to the special tribunal constituted to deal with them: *Barraclough* v. *Brown* (1); *Institute of Patent Agents* v. *Lockwood* (2); *Norwich Corporation* v. *Norwich Electric Tramways Co.* (3)

Secondly, at the date of the writ no one but the Crown was in occupation of this reclaimed land and the buildings upon it, and therefore no one could have been rated in respect thereof. Assuming that the premises were in the parish of Dover, what then? The appellants could not

purposes—"be annexed to and incorporated with the parish to which such accretion . . . . adjoins in proportion to the extent of the common boundary."

(1) [1897] A. C. 615, 621, 622.
(2) [1894] A. C. 347.
(3) [1906] 2 K. B. 119.

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be rated in respect of them, not being in occupation of them. Therefore no declaration ought to be made against them: *Earl Dysart* v. *Hammerton* (1), affirmed on this point in *Hammerton* v. *Earl Dysart*. (2) Order xxv., r. 5, of the Rules of the Supreme Court, "does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions." *Guaranty Trust Co. of New York* v. *Hannay* (3), per Pickford L.J. Neither can a person go and ask the Court for a declaration against a stranger on the chance of his becoming a party against whom relief may be claimed in the future. The mere expectation of being sued on an unfounded claim does not entitle a person to a declaration that he is not liable: *In re Clay* (4); and similarly the mere expectation of a claim or demand against others in certain events should not entitle a party to a declaration that if the events take place the claim will be valid. This is in substance the sort of declaration the respondents are claiming. As between them and the appellants it mattered not at the date of this writ whether the premises were in the parish of Dover or elsewhere, unless the appellants were occupiers. This claim for a declaration was therefore premature. The respondents ought to have waited until the appellants were in occupation. Until that happened there was no pretence for making them defendants in this action, and when the writ was issued no one could say when they would be, or if they would ever be, in occupation.

Thirdly, a declaration in favour of the respondents if granted will not enure for the benefit of their successors: *Plympton St. Mary Rural Council* v. *Reynolds*. (5)

Montgomery K.C. and *Thesiger* for the respondents. There are no merits in this objection. It is merely technical. The Crown is willing to make and the respondents are ready to accept an ex gratia payment in lieu of rates. The only obstacle in the way of this transaction is the question whether

(1) [1914] 1 Ch. 822.
(2) [1916] 1 A. C. 57.
(3) [1915] 2 K. B. 536, 562.
(4) [1919] 1 Ch. 66.
(5) [1909] 1 K. B. 768.

this land with the buildings upon it is in the parish of Dover; and it said that this question cannot be decided. It will require strong reasons to convince the Court of its inability to decide the question. And what are the reasons offered? First, that to make a declaration will be to adjudicate upon the rateability of the appellants, which the Court has no power to do. That might be a good reason if it were true that the Court is being asked to adjudicate upon rateability. But it is not being asked to do this. The question whether the premises are in the parish of Dover and the question whether the appellants are rateable in respect of them are not the same question. On an appeal to quarter sessions against a rate the consideration of the justices is not confined to the question whether a particular hereditament is within a particular parish. The boundaries of a parish may affect other questions besides rateability. The salary of an overseer or the settlement of a pauper might depend upon the extent of the parish. That is a good reason for holding that the High Court has jurisdiction to make the declaration asked for: see *Guaranty Trust Co. of New York* v. *Hannay*, per Pickford L.J. (1)

[SCRUTTON L.J. referred to *Milward* v. *Caffin* (2) and *Bristol Governors* v. *Wait*. (3)]

Those cases show that an action of replevin will lie at the suit of one whose goods have been seized on a distress warrant for a rate made upon him as the occupier of land alleged to be, but not in truth, within the parish. It follows that the High Court has jurisdiction, even when rateability is in question, to decide whether a particular hereditament is within a particular parish. But in any case the Court has power to make a declaration if it is necessary in order to do justice: *Barraclough* v. *Brown*, per Lord Watson. (4) All that is necessary in this action is that some one should represent the occupier. The appellants are the proper persons to do this, as they are the persons most interested in the decision. The Dover Harbour Board do not dispute

(1) [1915] 2 K. B. 563, 564.
(2) (1780) 2 W. Bl. 1330.
(3) (1834) 1 Ad. & E. 264.
(4) [1897] A. C. 615, 622.

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that the premises are part of the parish. At the date of the writ the appellants had a vested right to a lease of the premises, which has now in fact been granted to them. Nothing further was necessary to put them in occupation as soon as the Crown should retire from possession. The fact that they raised this question shows that they were interested.

As to the binding effect of a declaration upon the successors of the respondents, their successors will be privies to the judgment and bound accordingly: *Jones* v. *Lewis*. (1) Furthermore, the declaration, if made, will be in the nature of a judgment in rem, and will bind all the world.

Disturnal K.C. in reply. If this declaration is not sought with a view to establishing the rateability of the appellants it is not sought in aid of any right but merely in view of the willingness of the Crown to make a gratuitous payment. That is not a ground on which the Court can act.

THE EARL OF READING C.J. We will hear the appeal on the merits.

Disturnal K.C. and *Scholefield* for the appellants. This reclaimed land with the buildings upon it is not an accretion within the meaning of s. 27 of the Poor Law Amendment Act, 1868. It is certainly not a natural accretion. Neither is it an artificial accretion. In *Blackpool Pier Co.* v. *Fylde Union* (2) Lord Coleridge C.J. said: "It is said that if this pier had been a solid structure instead of resting on iron pillars it would be an accretion. I think it would not, and that a building thrown out into the sea is not an accretion from the sea." An artificial accretion means an accretion aided by artificial means; for example, an accretion to the foreshore promoted or furthered by means of groining. By no stretch of language could the word "accretion" be made to include land reclaimed from the sea by the means employed by the Harbour Board. Besides, it is not the soil formerly covered by the sea that is really being rated.

(1) [1919] 1 K. B. 328. (2) (1877) 46 L. J. (M. C.) 189, 192.

The substantial subject-matter of the rate consists of the station, refreshment rooms, and buildings erected upon that soil.

[BANKES L.J. referred to *Attorney-General* v. *Chambers*. (1)]

Montgomery K.C. and *Thesiger* for the respondents. *Blackpool Pier Co.* v. *Fylde Union* (2) differs widely in its facts from the present case. There was in that case no reclamation of land from the sea. The structure in question rested upon iron pillars. The passage relied upon by the appellants was an obiter dictum.

Cur. adv. vult.

July 29. The following written judgments were delivered.

THE EARL OF READING C.J. The plaintiffs were the overseers of the poor of the parish of Dover, and brought this action against the defendants to obtain a declaration under Order XXV., r. 5, of the Rules of the Supreme Court, that the land adjoining the Admiralty Pier at Dover upon which the Marine Station, with the railways and railway station, offices, refreshment rooms, lavatories and other buildings, has been constructed, is reclaimed land and forms part of the parish of Dover for all civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868. The defendants contended (*a*) that there was no jurisdiction in the High Court to make the declaration claimed, (*b*), that if there was jurisdiction the Court ought not to exercise its discretion by making the declaration, and, (*c*), that the land was not in fact reclaimed land within the meaning of the statute. The case was tried before Darling J. who decided in favour of the plaintiffs and made the declaration as prayed. The defendants appeal and ask that judgment be entered for them.

The land in question consists of about eleven acres adjoining the Admiralty Pier at Dover. The Dover Harbour Board, in pursuance of statutory powers under the Dover Harbour Board Act, 1906, proceeded by artificial works to exclude the sea from flowing over these eleven acres of land.

(1) (1859) 4 De G. & J. 55. (2) 46 L. J. (M. C.) 189.

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By the statute they were under obligation to grant and by agreement covenanted to grant a lease to the defendants of the land in question. Statutory power was given to the defendants to construct railway stations and railways upon the land so demised, and in pursuance thereof the defendants erected a marine railway station and constructed railways upon this land. At the outbreak of war in 1914 the Government took possession and control of the land and the buildings thereon, and used it as a station for landing wounded soldiers and other purposes. The Government continued to occupy the land and buildings until the year 1919 when the defendants resumed occupation and obtained the lease to which they were entitled, as stated.

In the year 1916 the overseers of the poor of the parish of Dover made a supplemental valuation list and claimed payment by the defendants of rates in respect of the railway station and buildings and railways upon the land. The defendants objected to the demand on the ground, first, that the land was not within the parish of Dover, and, secondly, that they were not in beneficial occupation of the land. As His Majesty's Government was in occupation of the land and buildings, the defendants were not in beneficial occupation and could not be made liable to the poor rate in respect of this land. The Government is not legally liable for the payment of poor rate, but, as is well known, usually makes a contribution ex gratia to the rates in respect of buildings occupied by the Government within the parish. In the present case the Government was willing to make this contribution to the plaintiffs for the year 1916 and succeeding years, but upon the terms as between the Government and the defendants that the contribution for this year and succeeding years, so long as the Government was in possession, should be taken into account in the final settlement of accounts between the Government and the defendants. The defendants objected upon the first of the two grounds already stated of their objection to the claim made by the overseers. The position thus created was that the Government was willing to contribute if the land was

within the parish of Dover. The plaintiffs asserted and the defendants denied that the land was an accretion from the sea within the meaning of the Poor Law Amendment Act, 1868, and, therefore, the land was within the parish of Dover. As the defendants were not in beneficial occupation of the land the plaintiffs could not maintain their claim for rates for the year 1916 against the defendants and could not therefore proceed to obtain a decision from the assessment committee or the Court of quarter sessions that the land was within their parish, notwithstanding that the Government was willing to contribute if a decision was obtained that the land was within the parish. The plaintiffs have no means of obtaining such a decision save by a declaration of this Court, and consequently they brought this action.

In my judgment the land in question is an accretion within the meaning of the statute. It is an accretion from the sea, and under the statute of 1868 it is immaterial whether this accretion is natural or artificial. Before the Harbour Board had succeeded in excluding the sea it flowed over the site upon which the station and buildings now stand; thus the bed of the sea to the extent of some eleven acres has been reclaimed from the sea, and forms an accretion from the sea within the meaning of the Act of 1868, and is, therefore, for all civil parochial purposes annexed to and incorporated with the parish of Dover. I scarcely think that this point can be seriously disputed.

As I understand the defendants' arguments, the more serious question is whether there is jurisdiction in the High Court to make this declaration. Upon consideration of the arguments addressed to us I have come to the conclusion that there is jurisdiction in the High Court to make the declaration prayed, and that in the exercise of its discretion it ought to make it. It was argued that the plaintiffs have no interest in the subject-matter of the litigation, and that the declaration, if made in this case, cannot be binding upon the defendants save for the particular year during which the plaintiffs were the overseers. There is in my view no substance in this

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contention. The plaintiffs were interested parties when they, as the overseers of the poor, brought their action in May, 1917, after lengthy correspondence, in order to obtain a decision whereby they would be enabled to receive the Government contribution in lieu of rates, and it was not unreasonable that they should seek to enforce their claim without waiting for the termination of the war, to which no one could then set a definite date. Once the matter at issue had been decided for the year 1916 it would not be raised again even if it did not technically bind the defendants for another year. Great stress was laid by the defendants upon the decision of *Barraclough* v. *Brown* (1), and it was contended that by virtue of the principle there established and the reasons given by their Lordships the Court could not or ought not to make the declaration. I cannot agree with this contention. The decision of the House of Lords in that case is, in the language of Lord Watson (2), that, "it cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing, the Court would be using a jurisdiction which the Legislature has forbidden it to exercise." If I thought that the effect of this declaration was to exercise the functions of the rating tribunals which are excluded from the jurisdiction of this Court, I should refuse the declaration; but I do not. The Court is not by this declaration exercising the jurisdiction exclusively given to the assessment committee and quarter sessions of enforcing payment of rates. Even in that case be it observed that Lord Watson says (2) that it is possible that their Lordships might make such a declaration if it were necessary in order to do justice. It is sufficient in the present case to say that the Court is not precluded by this decision of the House of Lords from making the declaration. The law relating to the making of declarations under the Rules of the Supreme Court, Order xxv., r. 5, was very elaborately discussed by the Court of Appeal in *Guaranty Trust Co. of New York* v. *Hannay* (3), and no useful purpose

(1) [1897] A. C. 615. (2) [1897] A. C. 622.
(3) [1915] 2 K. B. 536.

would be served by again reviewing it. The Master of the Rolls, then Pickford L.J., said (1): "The effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration." I think the plaintiffs were interested in the subject matter, as were also the defendants. I find no authority which would preclude the Court from making the declaration. Indeed, in both decisions relied upon, I find support for the proposition that in an exceptional case where it is reasonably necessary for the purpose of doing justice, and where the declaration is sought by a party who is interested in the subject matter of the litigation, the Court could and should make the order. This is an exceptional case which has arisen during and in consequence of the exceptional conditions caused by the war, and I think the High Court, so far as it can consistently with the authorities, ought to pronounce a decision which will set at rest a controversy arising in consequence of the Government's occupation of the railways, and should not unduly limit the operation of this valuable part of our procedure.

I think that Darling J. came to a right conclusion in making the declaration prayed, and that this appeal should be dismissed with costs.

BANKES L.J. In this action the respondents claim a declaration that certain reclaimed land is part of the parish of Dover for all civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868. Before the carrying out of the works for the extension of Dover Pier authorized by the Dover Harbour (Works, &c.) Act, 1906, the bulk of the land in question lay outside low-water mark, and formed part of the bed of the sea. The effect of the carrying out of these works was to reclaim the land from the sea. One of the questions in the action is whether the land so reclaimed can be properly held to be an accretion

(1) [1915] 2 K. B. 562.

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from the sea within the meaning of s. 27 of the Poor Law Amendment Act, 1868, which provides that every accretion from the sea, whether natural or artificial, which on December 25 then next was not included within the boundaries of or annexed to and incorporated with any parish, should for all civil parochial purposes be annexed to and incorporated with the parish to which such accretion adjoins. Darling J. before whom the case was tried has held that the land is an accretion from the sea. I agree with his decision on this point. The statute itself disposes of any distinction between natural and artificial accretions, because it specially includes both within its operation. For the purpose of ascertaining what constitutes an accretion no distinction can be drawn between a slow and gradual accretion and a rapid or immediate one: see *Attorney-General* v. *Chambers*. (1) I can see no reason why this land, which was once part of the bed of the sea, and which has ceased to be bed of the sea and become dry land, because of the works constructed upon it, is not an accretion from the sea. Mr. Disturnal laid great stress upon the fact that for rating purposes the erections and works upon the reclaimed land are what have to be considered, and not the reclaimed land. That no doubt is true; but the argument has in my opinion no bearing upon the question whether the land in question is or is not an accretion from the sea. If it is, then by virtue of the statute it becomes part of the parish of Dover, and any erections and works upon the land must necessarily be included in the parish also.

The other point taken for the appellants is one of some nicety. It is said that the present proceedings are a step merely in establishing, or attempting to establish, the appellants' liability to be rated in respect of the erections and works upon the reclaimed land, and that the High Court has no jurisdiction to entertain any such question. If the appellants had satisfied me that the real nature of the present proceedings was that suggested by them, I should have accepted their contention, because I consider that the

(1) 4 De G. & J. 55.

statutes regulating rating do contain special statutory provisions for settling the liability to be rated in respect of any hereditament, and that an action at law for the purpose of establishing the liability would not lie. The case of *Barraclough* v. *Brown* (1), relied upon by the appellants, supports their contention if the conclusion which they seek to draw from the facts is the correct one. In my opinion it is not the correct one. I do not think that it can fairly be said upon the facts that the respondents took the present proceedings in order to establish or support the validity of the rate upon the said works and buildings. The circumstances under which the present action was commenced are very special and peculiar. The extension of the Admiralty Pier was completed and the station and works erected upon it shortly before the war. In the year 1916 the station and works were inserted in a supplemental valuation list of the parish of Dover, and a rate was made and demanded of the appellants in that and each succeeding year in respect of the property. But for the war the appellants would under the provisions of the Dover Harbour Works Act have been in beneficial occupation of the property and would have been liable to pay the rate. When the war broke out the Government took possession of the pier including all the property assessed in the valuation list. Consequently no one has since that time been in beneficial occupation who could be rendered liable to pay the rate, and the statutory process for establishing liability to pay a rate has been inapplicable. The rating authority for the parish of Dover applied to the Government authorities for the ex gratia payment which is commonly made in lieu of rates where the Government are in occupation of rateable property. They in turn applied to the appellants to ascertain whether they accepted liability for the rates, and would pay them, and allow the amount to be settled in account upon the final settlement with the Government. To this the appellants replied that not being in beneficial occupation they were not liable to be rated, and further

(1) [1897] A. C. 615.

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that the property in question was extra-parochial. The position thus taken up by the appellants placed the rating authority in a real difficulty, and unless some means could be devised for satisfying the Government authorities that the property was in the parish of Dover, there was no prospect of obtaining either an ex gratia payment from the Government, or, for so long as the Government continued in occupation, any rates from what was a valuable property. This was the position of affairs at the time when the writ in this action was issued. Before issuing it, the respondents informed the appellants of what they proposed to do, and that they had no intention so long as the Government continued in occupation of attempting to enforce the rate against the appellants. In these circumstances the High Court has in my opinion jurisdiction to entertain the application for the declaration claimed. The statutory procedure before the assessment committee and quarter sessions is inapplicable. Unless the High Court has jurisdiction to decide the question whether the property is within the parish of Dover, the rating authority are without remedy so long as the Government continue in occupation of it. The appellants are not strangers to the proceeding, as the decision of the question is of just as much importance to them as it is to the rating authority, although the decision of it does not touch their present liability for the rate. In these circumstances the case in my opinion falls within the rules laid down for the application of Order XXV., r. 5, in the recent case in this Court of the *Guaranty Trust Co. of New York* v. *Hannay*. (1) Upon the question whether Darling J. was right in exercising the jurisdiction in favour of the respondents it appears to me that at the time the writ was issued it was wholly uncertain how long the existing state of things would continue, and that there was a reasonable probability of the Government making some ex gratia payment if the declaration sought for was made. Having regard to this state of things, and the very considerable loss to the rating authority if it was allowed to continue, I consider that the

(1) [1915] 2 K. B. 536.

declaration was properly made. The appeal fails on both grounds and must be dismissed with costs.

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SCRUTTON L.J. The substantial question which these proceedings were intended by the plaintiffs to decide is whether some eleven acres of made up soil which has been created by reclaiming land in Dover Harbour from the sea by walls, and levelling the surface up with chalk, is part of the parish of Dover. This depends under s. 27 of the Poor Law Amendment Act, 1868, on whether the eleven acres are "an artificial accretion from the sea," in which case they are to be for all civil parochial purposes annexed to the parish to which such accretion adjoins, which is in this case the parish of Dover. The language of the statute is somewhat odd, for the term "accretio" or "alluvio" was originally used of latent increases, additions so gradual as to be at each moment imperceptible, and from this point of view, as will be seen from the judgment of Lindley L.J. in *Hindson* v. *Ashby* (1), there have been many difficulties as to natural accretions to fixed boundaries. But Parliament has thought fit to talk of artificial accretions, a term which excludes the idea of latent additions, and clearly covers defined and intentional reclamations adjacent to fixed boundaries. I think it is clear that this area of eleven acres is such an "artificial accretion." Indeed the only reason suggested to us for holding the contrary was the decision in the *Blackpool Pier Case* (2) that a wooden decked pier resting on iron pillars was not an accretion from the sea. I think no one would ever speak of such an erection as land. Whether a stone jetty was such an accretion would depend on the particular facts, but when a plot of land so large as eleven acres with a large station upon it results from the reclamation, the case is clearly within the statute. In my opinion by virtue of this Act, this particular plot of eleven acres is within the parish of Dover.

A dilatory plea that this fact ought not to be determined by means of an action for a declaration was argued with such

(1) [1896] 2 Ch. 1, 13. (2) 46 L. J. (M. C.) 189.

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Scrutton L.J.

vigour and copiousness as almost to conceal the fact that there were no real merits in the objection, which only delayed the decision of a question which had some day to be decided, and on which an early decision was desirable. The objection was based on the view taken by the House of Lords in *Barraclough* v. *Brown* (1), that where a statute provided for the recovery of sums in a Court of summary jurisdiction, it was not proper to ask for a declaration in the High Court as to liability to pay those sums, for the recovery of which another remedy was given. On these lines it was said that questions of rating were to be determined by the assessment committee and quarter sessions.

In this case, however, under the peculiar circumstances of the war an odd situation had arisen. The Government were in possession of the reclaimed land, and the overseers of the parish of Dover could not therefore rate the South Eastern Railway, who were not in beneficial occupation. But the Government usually ex gratia pays a certain portion of rates on property it occupies. When application was made to the Admiralty for the usual ex gratia contribution for the reclaimed land, it was suggested that as ultimately the railway companies would be indemnified by the Government, the South Eastern Railway Company should pay rates and bring the matter into final settlement. To this the company replied that they were not in beneficial occupation, and in addition that the reclaimed land was extra-parochial. The Government took the latter objection as a reason for declining to make any contribution till the questions were decided, and suggested an early decision. But a decision could not be obtained through the rating machinery, for the Government were not rateable and the railway company were not in beneficial occupation. It could only be obtained by an action for a declaration, to which the South Eastern Railway Company, who were most interested in the matter, were the most appropriate defendants. If it were decided in favour of the parish, the Government could then be approached for the ex gratia contribution. And when the proceedings

(1) [1897] A. C. 615.

were started it was quite uncertain how long the war and the Government's occupation would last, and for how long rates would be legally irrecoverable in respect of the reclaimed land. These facts in my view raised a question quite outside the machinery provided by the rating statutes and eminently suitable for the procedure of declaration in the High Court. The objection of the defendants to the procedure, which had no substantial merits, was also in my opinion technically wrong, and the appeal should therefore be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Herbert H. Groves.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for R. E. Knocker, Dover.*

W. H. C.

THE KING *v.* LYON.

Ex parte HARRISON.

1920
Oct. 14.

Local Government—Lunacy—Asylums Officers—Payments in respect of extra Duties—Deductions—Superannuation Fund—"Emoluments"—Asylums Officers' Superannuation Act, 1909 (9 *Edw.* 7, *c.* 48), *ss.* 8, 16.

The London County Council, as the authority under the Lunacy Acts for the county of London, maintains a number of asylums. During the war many of the officers employed in those asylums undertook military service, and the asylums had to be carried on with depleted staffs. The Council called upon the remaining officers to undertake special duties or extra work outside the terms of their contracts, and, in consideration of the special services rendered, approved of special duty grants to those officers. Upon payment of the grants no deductions were made in respect of the superannuation fund under s. 8 of the Asylums Officers' Superannuation Act, 1909, as the Council considered that the payments did not come within the words "salary or wages and emoluments" in that section, but were mere gratuities. Out of the sum paid for special duty grants, the District Auditor disallowed a sum of 36*l.* 1*s.*, and surcharged it upon the Council:—

Held, that the special duty grants were "emoluments" within the

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meaning of s. 8 of the Act and were subject to deductions in respect of the superannuation fund, and that the disallowance and surcharge by the Auditor were therefore properly made.

RULE NISI for a writ of certiorari for disallowances and surcharges.

The application for the writ was made on behalf of Mr. F. C. Harrison, a member of the Finance Committee of the London County Council, in respect of certain surcharges made by Mr. Herbert Lyon, the District Auditor of the London County Audit District.

The London County Council is the authority under the Lunacy Acts for the County of London, and as such maintains a number of asylums. During the war many of the officers and servants employed by the Council in the asylums undertook military service, with the result that the work of each asylum had to be carried on with a greatly depleted staff, and the Council had to call upon the remaining officers and servants to undertake special duties not usually performed by them or extra work outside the terms of their contracts of service. In consideration of these special services the Asylums and Mental Deficiency Committee of the Council on February 28, 1919, approved of special duty grants for the financial year ending March 31, 1919, amounting to the sum of 1330*l.* 10*s.*, being made to certain officers and servants at the asylums, and the estimate was approved by the Council on March 4, 1919. In making the payments no deductions were made under s. 8 of the Asylums Officers' Superannuation Act, 1909, and carried to the fund out of which superannuation allowances are paid, as the Council were of opinion that such payments were not in the nature of "salary or wages and emoluments" within the meaning of s. 8, but were purely gratuities and not subject to deduction. By a certificate dated March 31, 1920, the District Auditor disallowed to the extent of 36*l.* 1*s.* the payments of 1330*l.* 10*s.* made as special duty grants, and surcharged the sum of 36*l.* 1*s.* upon Mr. F. C. Harrison. (1)

(1) Asylums Officers' Superannuation Act, 1909, s. 8: "Subject to the provisions of this Act, every established officer and servant

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Montgomery K.C. (*Sir J. Lithiby* with him) showed cause. It is contended in support of the rule that these payments for extra services were mere gratuities, and were not legally recoverable, but there is no general power to grant gratuities out of the rates. Under s. 4 of the Act certain gratuities may be granted "in the case of an established officer or servant dying while in the service of the asylum," but the section does not apply to a case like the present. These extra payments were "emoluments" within the meaning of s. 8, and as such were subject to deduction in respect of the superannuation fund. [He referred to *Ex parte Mellish.* (1)]

Macmorran K.C. (*Craig Henderson* with him) in support of the rule. These payments were gratuities. They were made once for all, and will not recur. The words in s. 8 "shall contribute annually" are inapplicable to such payments. The expression "emoluments" in the section must have a restricted meaning. It must be limited to payments which could be included in the schedule referred to in s. 16. It would be impossible to include these payments in the schedule. The word "emoluments" cannot include casual

employed in an asylum shall contribute annually, for the purpose of this Act, a percentage amount of his salary or wages and emoluments, according to the scale laid down in this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and to form part of the fund from which the superannuation allowances are to be paid."

Sect. 16: "The salary or wages and emoluments of an established officer or servant shall, for the purpose of computing the amount of a superannuation allowance or gratuity, be calculated according to the average amount of his salary or wages and emoluments during the ten years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment, or, in the case of an officer or servant with less than ten years' service, on the average amount during his whole period of service; and the expression 'emoluments' includes all fees, poundage and other payments made to any established officer or servant as such for his own use, and also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment.

"The annual money value of all such fees, poundage and other payments, apartments, rations, or other allowances in kind shall be set out in a schedule to be prepared by the visiting committee of every asylum and affixed in a conspicuous place in the asylum."

(1) (1863) 8 L. T. 47.

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payments made in respect of special services. Such payments are not subject to deduction in respect of the superannuation fund. [He referred to *Edwards* v. *Salmon*. (1)]

THE EARL of READING C.J. Mr. Francis Capel Harrison applied for a rule for a writ of certiorari directed to the District Auditor of the Local Government Board on the ground that the District Auditor had disallowed a sum of 36*l.* 1*s.*, and had surcharged the sum of 36*l.* 1*s.* in his certificate; and the whole question turns upon whether or not the District Auditor was right in refusing to certify that sum. It appears that at the mental hospitals of the London County Council during certain years of the war when difficulties arose in finding the officers and servants required at those hospitals, because of men having gone overseas or joined the Colours, a number of the officers and servants rendered extra services and also took upon themselves additional responsibilities; and the question that arises is whether the payment of 1330*l.* 10*s.* made by the London County Council as special duty grants to certain established officers or servants at the various mental hospitals who rendered these extra services and undertook these extra responsibilities was an amount which is to be regarded as payment made to the established officers or servants as a part of their emoluments. The reason is that under the Asylums Officers' Superannuation Act of 1909, there are provisions, to which I will refer directly, which make it incumbent on the established officer or servant to contribute a percentage amount according to the scale laid down in the Act of Parliament towards the pension which shall be granted to him upon retirement; the policy of the Legislature being that there shall be individual contributions of a certain percentage, and the amount of the pension is supplemented under a scheme in the Act, and the consequence is that a man receives an additional pension if he has been receiving additional payments for services within a certain prescribed period before he retires.

Quite briefly stated, this case resolves itself into this one

(1) (1889) 23 Q. B. D. 531.

question, were these payments for extra services and extra responsibilities payments made in respect of "salary or wages and emoluments"? On the one hand it is contended on behalf of Mr. Harrison (who is merely undertaking the duty of applicant for the purpose of getting the point decided) that these payments were gratuities to each of the men, and are not to be regarded as salary or wages or emoluments. On the part of the District Auditor it is said that these payments are not gratuities, but are payments for services rendered, and are "emoluments" which accrued to these established officers and servants, and that consequently the contribution to the pension fund must be made. If the District Auditor is right, the sum of 36*l.* 1*s.* should be disallowed, or surcharged. If, on the other hand, Mr. Macmorran is right, then the certificate of the District Auditor was wrong, and he ought not to have disallowed or surcharged the sum of 36*l.* 1*s.* In my opinion, the question turns upon the words of the Act of Parliament, and I cannot see why the word "emoluments" is not to be construed according to the ordinary meaning of the word in the English language when we find it in an Act of Parliament without any qualifying words. In s. 8 there is the provision that there shall be a contribution of a percentage amount of every established officer's or servant's salary or wages and emoluments. Now that seems to contemplate that the officer will be receiving a salary and the servant wages, and both or either of them may receive emoluments; that is, additional payments beyond the salary or wages payable to him under his contract. If there was any doubt about it, I think it is set at rest by referring to s. 16 of the Act which provides that: "The salary or wages and emoluments of an established officer or servant shall, for the purpose of computing the amount of a superannuation allowance or gratuity, be calculated according to the average amount of his salary or wages and emoluments during the ten years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment." Then it goes on: "and the expression 'emoluments' includes all fees, poundage and other payments made to any

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Earl of Reading C.J.

established officer or servant as such for his own use." If I stop at those words, I can see no reason why the words "other payments made to any established officer or servant as such for his own use" would not include extra payments for extra services and extra responsibilities undertaken. We are asked by Mr. Macmorran to give a more restricted meaning to the word "emoluments" in this Act of Parliament for the reason that there is another paragraph at the end of s. 16 which says that the annual money value of all such fees, poundage and other payments "shall be set out in a Schedule to be prepared by the visiting committee." That does not seem to me to present any difficulty. Though at first it may have been the duty of the visiting committee to have made out the list of payments in the schedule, the fact that they did not do it cannot alter the meaning of the word "emoluments" in the preceding paragraph. Further, I think that the definition that the expression "includes" all fees and other payments is not meant to be in any way an exhaustive definition; if anything, it is meant to throw the net rather wider than perhaps might be held to be the case if the language were simply "salary or wages and emoluments." In any event, I can see no reason for giving a restricted meaning to the term, and in my judgment, once I have arrived at that conclusion, it decides this case, and, without going through the schedule in detail, it is sufficient to say that I think, as was pointed out by my brother Avory during the argument, that every one of the items in this extended schedule, showing the actual payments made, can be brought within the words "extra work and responsibility"; and it is to be observed that this is extra work and responsibility in the employment which the established officer or servant is actually engaged for. That is to say, he is employed in a particular capacity in a mental hospital of the London County Council; through shortage of men at the time he does extra work, and it may be extra work referable only to the particular class of work which he was doing, or it may be, as in the case of the chaplain, that, when he undertook the duty of a choirmaster and organist he was

doing something other than the work which he had hitherto been undertaking for the London County Council; but in any event it all comes back to this, that the work which the officer or servant was doing was work for the same employer in the same institution, in respect of the same class of work; the only difference being that it may be said in some of the cases, comparatively rare cases, that the work was slightly different in character, although always connected with the particular work upon which he had been engaged before this extra work and responsibility were undertaken.

Having come to that conclusion, I think that the District Auditor was right and that the amount paid, 1330*l.* 10*s.*, must be treated as part of the emoluments of the established officers or servants. I am glad to have come to that conclusion, because I see no hardship or difficulty in it. The men who did the services during the war have been remunerated by these extra payments by the London County Council, and really the only question in the case is whether this extra remuneration is to be regarded as part of the amount in respect of which a percentage is payable as a contribution towards a pension, and in respect of which the officer is entitled to calculate his pension if he retires, or when he retires, during the years prescribed by the Act. For these reasons, I am of opinion that the rule must be discharged.

DARLING J. I am of the same opinion. It is said that there is a difficulty about this case in many respects, but particularly because what was paid here to one officer who was an established officer for doing more work than that which he at first contracted to do was not paid to him as "an established officer or servant as such for his own use." Now it was paid to him for his own use. If he had not been an established officer this case could not have arisen; it was paid to him for doing the work which another established officer did before the war, and therefore it appears to me that what he received in each of these instances was a payment made to an established officer as such for his own use. Now

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Darling J.

another difficulty is raised upon s. 8 of the Act. It is pointed out that the words are "Subject to the provisions of this Act, every established officer and servant employed in an asylum shall contribute annually"—it is said how can he "contribute annually"? The war is over. He cannot contribute next year, because there will be no difficulty in employing the ordinary number of servants, and therefore next year he will not get the money. I do not see any difficulty about that. He will contribute annually in the years in which he does get the money, and the result will be that when it comes to calculating his pension, for some years it will be put down to his benefit that he received more than the ordinary salary attaching to his particular office, and that will give him an increase of pension. It would be really unjust, seeing that this is a contributory fund, that he should get the increase of pension and yet should not increase his contribution to the fund from which the pension is paid. This point about the word "annually" never could have arisen if the war had continued, say, as long as the Thirty Years' War, which it might quite well have done; but for some events that happened towards the end of the year 1918, the war might still be going on, as we are constantly reminded; and besides, it is perfectly notorious that it came to an end much too soon for many people who were perfectly happy and comfortable in this country enjoying many benefits which were paid for by those who were fighting abroad. Another difficulty which is raised upon s. 8 is this: it says he shall contribute annually a percentage of his salary, wages and emoluments, "such amount to be from time to time deducted from the salary or wages." Now it is quite agreed that if these sums are to be regarded as liable to contribute to the pension fund, it must be because they are part of his emoluments, and it is pointed out that it is not said that the amount is to be deducted from the emoluments but only from the salary or wages; and so it is argued that as these sums are only emoluments, and nothing is said about deduction from the emoluments, the emoluments are not liable to contribute to the pensions fund. That argument seems to me to have

little effect for this reason: there are many things which are emoluments from which, if this section had said: you shall deduct from emoluments, there could be no deduction for the pensions fund, because among the emoluments there may be the money value of apartments or of rations. Now the man who gets that has not had the money. What he has had is apartments or rations, and it would be impossible to deduct from the apartments something to contribute to the pensions fund. Supposing he had three rooms, you could not take one of the rooms and contribute it to the pensions fund. Suppose he has had rations, you could not take a perishable part of his dinner served up to him in June and contribute it to the pensions fund in October. Therefore what the State says is you shall regard it all as money, some of these things are not money, some of them are apartments, rations and things in kind, you cannot deduct from things in kind, some of which have been consumed, and therefore you shall deduct the value of them from the salary or wages; and you may deduct, as it seems to me, the other emoluments which are not in kind but are in money, even more easily from the salary or wages which you are paying. Now why is this said? It is because the man is an established officer or servant. He is a man who is bound to be receiving a salary or wages, otherwise he does not come within this scheme at all; the question cannot arise, and so it is because there is certain to be a salary due to him, or wages due to him, and emoluments due to him, that you can deduct from the salary what is due in respect of the salary and can also deduct from the salary what is due in respect of the emoluments whether the emoluments be in money or in kind. Therefore it seems to me that the objections taken are answered and that the officer who made this surcharge was right, and that the rule should be discharged.

AVORY J. I agree that the surcharge and disallowance made by the District Auditor in this case were properly made. I see no reason for putting different meanings upon the word "emoluments" which occurs in s. 2, in s. 8, and in

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AVORY J.

s. 16; and if the word is to have the same meaning, I cannot doubt that in computing the amount of superannuation allowance under s. 2, the annual amount of which is to be computed at the rate of one-fiftieth of his salary or wages and emoluments for each completed year of service, the amounts which are in question in this case would be properly included under the head of "emoluments" in the completed year of service. So again, when you come to s. 8, which provides that every established officer or servant shall contribute annually a percentage amount of his emoluments according to the scale laid down in the Act, you turn to s. 9 to find what the scale is, and that provides that the percentage amount to be deducted annually for the purposes of the Act shall be in the case of officers and servants with less than five years' service "2 per cent. of the salary or wages and emoluments for each year." I cannot doubt that in calculating that contribution which is to be made under s. 8 you must take into account the whole of the emoluments, including these particular payments in cash which have been received in that particular year. So again, when you come to s. 16, which provides that for the purpose of computing the amount of the superannuation allowance the salary and emoluments are to be calculated according to the average amount of those emoluments during the ten years ending on the quarter day preceding the day on which he ceases to hold his office, I cannot doubt that in that section the word "emoluments" must be taken to include salary and payments. In my opinion it is not necessary to look at the special definition of the word "emoluments" in that section, which is not exclusive, because the ordinary meaning of the word is sufficient to include such payments as these. Therefore I do not feel called upon to express any opinion as to the true meaning of the special definition which is given of the word "emoluments" in s. 16.

Rule discharged.

Solicitors against the rule: *Sharpe, Pritchard & Co.*
Solicitor for prosecutor: *D. P. Andrews.*

F. F. C.

J. P. HALL AND COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1920
Oct. 15.

Revenue—Excess Profits Duty—Accounting Period—Profit—Date of making—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38.

The appellants on March 29, 1914, made a contract for the supply by them to a company of fifty-five electric motors complete with control gear, deliveries to commence on July 1, 1914, and to terminate on September 30, 1915. The appellants, on April 3, 1914, made a sub-contract for the supply of the control gear by another company, thereby making a profit of 1064*l.* The deliveries of the control gear were made by the sub-contractors direct to the company on various dates after August, 1914, the final delivery being in July, 1916. The appellants' accounts showed that the profits from the transaction were credited in the several periods in which the deliveries were effected. The appellants were assessed to excess profits duty for the accounting period ended June 30, 1916; the assessment included a sum of 570*l.*, which was the amount of the profit made by the appellants in respect of the deliveries of control gear in that period:—

Held, that the profit in question was made at the date of the making of the sub-contract—i.e., April 3, 1914—and that excess profits duty was, therefore, not chargeable thereon.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on December 3, 1918, for the purpose of hearing appeals, J. P. Hall & Co., Ld., hereinafter called the appellants, appealed against an assessment to excess profits duty on the sum of 3241*l.*, for the accounting period commencing on January 1, and ending on June 30, 1916, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915 (1), and subsequent enactments.

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 38: "(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded, by more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act a duty (in this Act referred to as 'excess profits duty') . . . ."

Fourth Schedule. Part. I.—Computation of Profits: "1. The profits shall be taken to be the actual profits arising in the accounting

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There was no dispute as to figures, the sole ground of appeal being that the appellants claimed that their profits from a contract for the purchase and sale of certain control gear in the circumstances hereinafter set forth should be allocated to the standard period for the six months ended June 30, 1914, and not to the several accounting periods in which the delivery of the control gear took place under the contract.

The facts were as follows: The appellants carried on business as electrical and mechanical engineers at Blackriding Ironworks, Werneth. On March 24, 1914, the appellants entered into a contract with Douglas & Grant, Ld., Kirkcaldy, for the supply by the appellants to that company of fifty-five electric motors complete with control gear, delivery of which was to commence on July 1, 1914, and to terminate on September 30, 1915, payment to be within one month after delivery. The appellants themselves manufactured the motors, and no question arose with respect thereto. The appellants, however, in compliance with the provisions of the contract on April 3, 1914, made a sub-contract for the control gear with Allen, West & Co., Ld. By direction of Douglas & Grant (as specified in the contract of March 24, 1914), the first set of the control gear was to be delivered to their works, and the remaining fifty-four sets were to be delivered direct to Rosyth dockyard. None of the sets of control gear was delivered to the appellants, nor by the appellants to Douglas & Grant. The appellants in pursuance of the above directions requested Allen, West & Co. to make

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period; and the principle of computing profits by reference to any other year or an average of years shall not be followed. . . . . (11.) In the case of any contract extending beyond one accounting period from the date of its commencement to the completion thereof and only partially performed in any accounting period there shall (unless the Commissioners of Inland Revenue, owing to any special circumstances, otherwise direct) be attributed to each of the accounting periods in which such contract was partially performed, such proportion of the entire profits or loss or estimated profits or loss in respect of the complete performance of the contract as shall be properly attributable to such accounting periods respectively, having regard to the extent to which the contract was performed in such periods."

delivery of the control gear in manner aforesaid and in fact all the deliveries were so made. The appellants were under no duty to perform any work or labour upon or in connection with the control gear under the contract of March 24, 1914.

The sum to be paid by the appellants to Allen, West & Co. was 6699*l.*, whereas the appellants were to receive from Douglas & Grant for the control gear 7763*l.*, the resultant profit to the appellants being 1064*l.* Both Allen, West & Co. and Douglas & Grant were companies of high standing with regard to whose competence and financial position there was no possible doubt.

Owing to the war deliveries by Allen, West & Co. were interfered with and delayed. The profit on the deliveries made in the six months ended December 31, 1914, was 85*l.*; in the six months ended June 30, 1915, 224*l.*; in the six months ended December 31, 1915, 184*l.* The final delivery took place in July, 1916, with a profit of 570*l.*

The appellants' accounts showed that the profits from the transaction were credited in the several periods in which the deliveries were made by Allen, West & Co. to Douglas & Grant and payments became due and were received by the appellants from Douglas & Grant, the profits appearing regularly in the appellants' accounts immediately following the dates on which the deliveries took place.

The appellants' auditor gave evidence and stated that the profit in question might well have figured in the appellants' accounts as at June 30, 1914, and that he would have been prepared to certify the appellants' accounts for the period to June 30, 1914, with the profit of 1064*l.* included therein He admitted that in the ordinary way a profit of this kind would not be included in the accounts until the invoices were received—that is to say, at the actual dates of delivery of the goods.

It was contended on behalf of the appellants: That the profit on the transaction in question was ascertained and made on the completion of the contract for the purchase and sale—namely, on April 3, 1914; that the profit resulted from a pre-war contract and formed part of the appellants'

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profits and gains of the six months ended June 30, 1914, and not of the various accounting periods in which delivery took place; that the way in which the appellants' accounts had been drawn up could not bind the appellants for taxation purposes; that the assessment should be adjusted in accordance with the foregoing contentions by allocation of the whole 1064*l.* to the pre-war period, or of that amount less any trifling allowance that should be made on account of discount of money.

On behalf of the respondents it was contended (inter alia): That the profit under the contract of March 24, 1914, was attributable to the several accounting periods in which it was partially performed; and that the appellants' claim was untenable. Rules 1 and 11 of Part I. of the Fourth Schedule of the Finance (No. 2) Act, 1915, were relied on in support of the respondents' contentions.

The Special Commissioners confirmed the assessment, subject to certain agreed adjustments.

A. M. Latter for the appellants. Rule 11 only applies to contracts for work and not to sales. For the purpose of ascertaining a trader's liability to excess profits duty, it is necessary to determine the date at which the profit in a legal sense was made. The manner in which the transaction and the profits arising therefrom have been dealt with in the trader's own accounts is immaterial. "'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year": *In re Spanish Prospecting Co.* (1), per Moulton L.J. In each period the assets of the business must be valued in order to ascertain the amount of the profits made by the business in the period in question. In this case the profit on the contract would rightly be included in the valuation of the appellants' assets for the period expiring on June 30, 1914, the profit is in law made in that period, and the appellants are, therefore, not liable to excess profits duty.

(1) [1911] 1 Ch. 92, 98.

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Sir Gordon Hewart A.-G. and *R. P. Hills* for the respondents. The argument for the appellants is opposed to their own method of book-keeping, and to the general practice of business men. The question is one of fact and the Commissioners have rightly found the facts against the appellants. By s. 40 of the Finance (No. 2) Act, 1915, profits for the purposes of the excess profits duty are to be determined on the same principles as for income tax. For income tax purposes the profits in this case would rightly be treated as having been made at the respective dates of payment: *Sun Insurance Office* v. *Clark.* (1)

Latter in reply referred to *General Accident, Fire and Life Assurance Corporation* v. *McGowan.* (2)

ROWLATT J. In my opinion the point made by the appellants in this case cannot be resisted. The excess profits duty has been imposed upon the difference between the profits made in what for shortness I will call the post-war period and the pre-war period. It is a new tax based upon a new principle—namely, the comparison of the profits made in one period with the profits made in another period—and I think that a taxpayer is entitled to say that, whatever method may have been adopted by him in the past in allocating profits to particular years for the purpose of income tax or in his private accounts, when it becomes necessary to compare the productiveness in profits of one period with another period, he is entitled to have that comparison made with perfect accuracy.

The appellants in the pre-war period made a contract of purchase and sale, which if the parties to it were solvent, as in fact they were, showed a clear profit for the appellants; and if a true statement of the appellants' accounts had been made at the end of the period—namely, on June 30, 1914—this profit should have been taken into consideration. There is no question, that if the appellants had had to value their business for the purpose of selling it, they would have been entitled to treat this contract as an asset, and to show the

(1) [1912] A. C. 443. (2) [1908] A. C. 207.

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probability of profit, subject of course to a valuation and to a proper allowance for risk. If on the other hand they had made a contract which showed a probability of a loss that would have had to be taken into account against the appellants. I think, therefore, that if the appellants insist upon it they are entitled to treat the whole of the profits arising from this contract as profits made in a pre-war period; but the principle must be applied consistently, and if the appellants have brought into the last pre-war trade year any receipts applicable to contracts which had been closed during the period before that last pre-war period, those receipts must be taken out.

I shall, therefore, order the case to go back to the Commissioners to take the account upon the footing which I have indicated, and I shall reserve the costs of this appeal until the result of the further account has been ascertained.

Appeal allowed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

F. O. R.

In re An Arbitration between THORNETT and FEHR and YUILLS, LIMITED.

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Oct. 18, 19.

Sale of Goods—Contract—Unascertained Goods—Breach—Frustration or Cancellation of Contract—Implied Term—Sale of "200 tons, 5 per cent. more or less"—Extent of Seller's Liability.

By a contract in writing the sellers sold to the buyers "200 tons 5 per cent. more or less," of Australasian beef tallow of two specified brands, 1919 make, shipment to be made from Australia during the months between May and August. The contract provided that should the shipment be delayed by strikes or other case of force majeure the time of shipment should be extended by one month. Should the delay exceed one month buyers should have the option of cancelling the contract forthwith or of accepting the goods for shipment as soon as possible, but should shipment not be possible within twelve months from the date of shipment originally stipulated contract to be void. The sellers although they contracted as principals were the agents of the Q. M. E. Co. which manufactured tallow of the brands specified at two works in Australia. The Q. M. E. Co. did not in fact manufacture tallow in 1919 at one of their works, although they could have done so and could have produced tallow of the brand manufactured at those works. They produced during 1919 only 161 tons of beef tallow of the other specified brand at their other works, but production of tallow at those works was prevented by a strike of employees between June 23 and September 8 which resulted in a complete cessation of operations. The buyers elected to extend the time for delivery, but no delivery was made, although the Q. M. E. Co. offered to deliver the 161 tons when shipment was possible. The buyers claimed in an arbitration to recover damages for the non-delivery of 39 tons—namely, the difference between 161 tons and 200 tons :—

Held, (1.) that inasmuch as the contract was for the sale of unascertained goods and not of specific goods an implied term could not be read into the contract exonerating the sellers from liability if the company who manufactured the goods did not for any reason manufacture them, and that there was in consequence no frustration or cancellation of the contract ; (2.) that as the contract was for the sale of "200 tons, 5 per cent. more or less," of tallow the sellers could comply with their obligation under the contract by delivering 5 per cent. less than 200 tons—namely, 190 tons—and therefore the sellers could only be held liable in damages for not delivering up to 190 tons.

Special Case stated under s. 19 of the Arbitration Act, 1889.

By a contract in writing dated April 16, 1919, Thornett and Fehr of London (hereinafter called "the buyers") contracted

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to purchase from Yuills, Ld., also of London (hereinafter called "the sellers") "200 tons, 5 per cent. more or less," of Australasian double triangle T/A or double triangle B/A beef tallow, fair average quality of the brands, 1919 make, at 72*s.* per cwt. ex ship. The contract was on form No. 14 of the London Oil and Tallow Trades Association. Clause 5 of the contract provided as follows: "Shipment by steamer and/or steamers direct or indirect with and/or without transhipment during the months of May/August from Australia." Clause 8: "Should the shipment be delayed by fire, strikes, lock-outs, riots, war, revolution or other case of force majeure the time of shipment shall be extended by one month. Should the delay exceed one month buyers shall have the option of cancelling the contract forthwith or of accepting the goods for shipment as soon as possible, but should shipment not be possible within 12 months from the date of shipment originally stipulated contract to be void. The option to be declared as soon as the shippers announce their inability to ship within the extended period of one month, a reasonable time being allowed for passing on such announcements. Should buyers fail to exercise their option in due time contract to be void, if required sellers must produce proof to justify their claim for extension."

The sellers, though they entered into the contract ostensibly as principals, were in fact contracting as agents for the Queensland Meat Export Co. (hereinafter called the "Q. M. E. Co.") to whom the brands mentioned in the contract belonged. The Q. M. E. Co. had at all material times two works only both situated in Queensland—namely, at Townsville and Brisbane respectively. The mark double triangle T/A denoted tallow made at the Townsville works, and the mark double triangle B/A tallow made at the Brisbane works of the Q. M. E. Co.

The Q. M. E. Co. did not open their Brisbane works during the season of 1919 and consequently did not make any double triangle B/A tallow 1919 make. The reason given by the Q. M. E. Co. for not opening those works during the 1919 season was that owing to the limited number of cattle and

competition and consequent high prices, they could not have done so at a profit.

The Townsville works of the Q. M. E. Co. were opened on May 6, 1919. On June 23, 1919, a strike of the employees at those works occurred resulting in a complete cessation of killing operations. The strike continued until September 8, 1919. On August 18, 1919, the sellers received from the Q. M. E. Co. a cablegram stating that they had definitely closed the season at their Townsville works and had cancelled all their contracts for the purchase of cattle.

On October 1, 1919, the Q. M. E. Co. cabled to the sellers that on the termination of the strike they had immediately made efforts to secure further cattle, but that owing to the lateness of the season and the bad weather conditions none were obtainable; that therefore it was definitely impossible to ship the full contract quantity of tallow, but that they had certain stocks on hand, but could not yet obtain shipping space for them. On October 6, 1919, the Q. M. E. Co. wrote to the sellers confirming the cablegram and explaining that there was no cattle in suitable condition to enable them to resume killing operations.

The usual killing season in Brisbane is from January to June and in Townsville from April to October both inclusive.

On July 4, 1919, the Q. M. E. Co. informed the sellers that there was no prospect of the strike being settled and that this might result in the termination of the season and that they had in hand 150 tons of "A" tallow which they hoped to ship later and which they would leave the sellers to allocate against contracts. On July 24, 1919, the sellers informed the buyers of the strike and that as far as they knew there was nothing afloat against the contract. On August 7, 1919, the sellers warned the buyers that they would probably have to claim the benefit of the strike clause in the contract.

On October 13, 1919, the buyers notified the sellers that they presumed the goods had been shipped and awaited tender. If actual force majeure as provided for in the contract had caused delay in shipment they would accept

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the goods for shipment as soon as possible. They also asked for proof of force majeure if that should be pleaded.

On October 20, 1919, the sellers notified the buyers that they were instructed by their principals to give them notice pursuant to clause 8 of the contract that their principals had been unable to ship within the extended period of one month by reason of strikes and force majeure. They also stated that this gave the buyers the option of cancelling the contract forthwith or of accepting the goods for shipment as soon as possible. They further mentioned that their principals had on hand 160 tons "A tallow" of the 1919 make and offered to ship same to the buyers when opportunity should occur. They also stated that in view of the delay they could take no responsibility for the condition or quality of the goods.

On October 23, 1919, the buyers wrote electing to accept 200 tons for shipment as soon as possible. The sellers wrote again on October 25, 1919, stating that there was no possibility of completing the contracts within the extended period of twelve months mentioned in clause 8 of the contract. The buyers replied on October 30, 1919, that they had declared their option and the sellers would have to ship as soon as possible, and that sellers would also have to prove that shipment had been delayed by causes in conformity with the clause in the contract. The buyers further stated that if the sellers refused to deliver in due course it would be better to proceed to arbitration at once. Buyers and sellers subsequently proceeded to arbitration in accordance with the rules of the London Oil and Tallow Trades Association.

On December 9, 1919, an award was duly made by the umpire by which he awarded as follows :—

"(1.) Contract being for 200 tons, 5 per cent. more or less, sellers are responsible to buyers for 190 tons.

"(2.) That the 161 tons, advised by sellers as ready for delivery, be shipped to London from Australasia by steamer or steamers direct or indirect, with and/or without transhipment, as soon as possible.

"(3.) That balance, 29 tons, be invoiced back by buyers to sellers at the price at which buyers could at present buy

a similar grade of tallow for early shipment on contract conditions. Price to be agreed by buyers with sellers, any dispute to be settled by present arbitrators and umpire."

The sellers being dissatisfied with the award duly gave notice of appeal to the Committee of Appeal of the London Oil and Tallow Trades Association, and the matter was thereupon referred by the Committee to the Board of Appeal appointed to hear the appeal by whom this special case was submitted to the Court at the request of the sellers.

The Board of Appeal did not find that as regards Brisbane there was any strike by which shipment could have been delayed. As regards Townsville shipment was impossible between June 23 and September 8, 1919, owing to the fact that the Government could not send steamers there during the strike, and that the railwaymen refused to permit the products of the Q. M. E. Co. to travel by railway. The Board of Appeal were satisfied that there was very considerable difficulty in obtaining freight space during the shipping period, Australasian tonnage to the United Kingdom being under Government control, but having regard to the fact that by the contract shipment might be made from any part of Australia, by steamer direct or indirect and either with or without transhipment, the Board were unable to find that shipment either was possible or was not possible during the shipping period including the extended period of one month.

The Board of Appeal found as facts: that the Q. M. E. Co. produced no beef tallow of the double triangle B/A brand, 1919 make; that the Q. M. E. Co. could have operated their Brisbane works and could have produced beef tallow of the double triangle B/A brand, 1919 make, had they seen fit to do so, but the Board were unable to say what quantity the Q. M. E. Co. could have produced, but in ordinary circumstances they could without difficulty have produced sufficient to complete this contract; that the Q. M. E. Co. produced 161 tons of double triangle T/A beef tallow, 1919 make, and no more; that during the period between June 23 and September 8, 1919, there was, owing to strikes, a complete cessation of operations at the Townsville works of

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the Q. M. E. Co. and that production was prevented by strikes between those dates; that in the opinion of the Board had such cessation not taken place those works could in a normal year during the period covered by the cessation have produced sufficient beef tallow to complete their contract; that the Q. M. E. Co. could have reopened their Townsville works after the termination of the strike on or about September 8, 1919, had they seen fit to do so, and could have produced a further quantity of double triangle T/A beef tallow, but the Board were unable to say what further quantity they could have produced; that any deficiency of cattle at the Townsville works of the Q. M. E. Co. tending to hamper the resumption of operations after September 8, 1919, and/or to restrict the output was largely due to the action of the Q. M. E. Co. in cancelling their contracts for the purchase of cattle on or about August 15, 1919; that the buyers duly exercised their option under clause 8 of the contract to accept the goods for shipment as soon as possible, but that such exercise was subject to the sellers producing proof to justify their claim for extension; that the sellers expressed themselves as ready and willing to ship the above-mentioned 161 tons to the buyers.

The Board of Appeal said that para. 1 of the award, which read as follows, "Contract being for 200 tons, 5 per cent. more or less, sellers are responsible to buyers for 190 tons," appeared to them to raise the question as to the effect of the words "5 per cent. more or less" in clause 1 of the contract. The Board said that they were unanimously of opinion (and that that opinion was held generally among business men in the tallow trade) that the phrase "5 per cent. more or less" operated merely to cover accidental or inadvertent variations from the quantity stated in the contract; that it did not entitle a seller deliberately to supply either 5 per cent. more or 5 per cent. less than the contract quantity, and that, for the purpose of adjudicating on a breach of contract, regard should be had to the contract quantity alone. The Board desired to submit to the Court the question whether their opinion was right in point of law.

The questions for the opinion of the Court were: (1.) Whether on the facts stated and found there was in law any frustration or cancellation of the contract. (2.) Whether on the facts stated and found clause 8 of the contract operated in law to relieve the sellers of their obligations under the contract, and if so, to what extent. (3.) Whether as a matter of law the arbitrators ought to treat the contract as being a contract for 200 tons, or whether they were at liberty at their discretion to treat it as a contract for 190 tons or 210 tons or any number of tons falling between those limits.

A. T. Miller K.C. and *S. L. Porter* for the sellers. The contract was for the sale of two particular brands of tallow to be manufactured in 1919 by the Q. M. E. Co. The non-existence of tallow manufactured by the Q. M. E. Co. at Brisbane in 1919 arising from a cause for which the sellers were not responsible and of which they were ignorant when the contract was made rendered the contract impossible of performance by means of Brisbane tallow and frustrated the contract. The parties contracted on the basis that goods of that particular brand would come into existence and a term to that effect ought to be implied in the contract: see *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) The total output of tallow made by the Q. M. E. Co. during 1919 was only 161 tons and therefore the contract was frustrated and cancelled as to the balance whatever the cause of the shortage of output. As the shortage of output at the Townsville works was caused by strikes, riots, and force majeure clause 8 operates to relieve the sellers from any obligation in respect of such output. Force majeure in this case means that the sellers were prevented from carrying out the contract by something beyond their control and for which they are not responsible. It was held in *Taylor* v. *Caldwell* (2) that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to its perishing without any default in the seller, the delivery is excused. The principle of that decision

(1) [1916] 2 A. C. 397, 403. (2) (1863) 3 B. & S. 826.

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was applied in *Howell* v. *Coupland* (1) and *Krell* v. *Henry*. (2) In the present case the non-production of the goods was not due to the fault of the sellers but to the acts of third parties. The fact that the sellers were agents and that it was their principals who were in default is immaterial, as the sellers were treated by the buyers as principals. In any event the buyers are only entitled to recover damages in respect of the non-delivery of the difference between 161 tons and 190 tons. It is not a contract for the sale of 200 tons of tallow, but of " 200 tons, 5 per cent. more or less " and the sellers have the right under that contract to say how much they will deliver within those limits. The sellers would have fulfilled their obligations under the contract if they had delivered 190 tons and therefore they cannot be liable in damages to a greater extent than for the non-delivery of that amount.

R. A. Wright K.C. and *Claughton Scott* for the buyers. This was a contract for the sale of unascertained goods and not of specific goods. The doctrine of frustration has only been applied to a case of the sale of specific goods; the Courts have always refused to apply the doctrine to a case of the sale of unascertained goods. Where there is a contract for the sale of unascertained goods the sellers are bound to provide the goods unless there is an express term in the contract relieving them from that obligation. In *Lebeaupin* v. *Crispin* (3) there was a sale of unascertained goods which the sellers had to obtain from the manufacturers of the goods, and McCardie J. held that the fact that the sellers were unable to obtain the goods from the manufacturers, owing to the default of the manufacturers, did not excuse the sellers from liability to the buyers. To read into the contract, as the sellers contend ought to be done, an implied term that the sellers should not be liable to the buyers if the manufacturers of the goods sold, who were the principals of the sellers, for any reason did not manufacture the goods, would be to render the contract nugatory. The sellers are liable in damages for the non-delivery of 200 tons. The phrase " 5 per

(1) (1874) L. R. 9 Q. B. 462; affirmed (1876) 1 Q. B. D. 258.
(2) [1903] 2 K. B. 740.
(3) [1920] 2 K. B. 714.

cent. more or less" only covers accidental or inadvertent variations from the contract quantity; it does not entitle a seller who is in default to escape liability for damages by saying he could fulfil the contract by deliberately supplying 5 per cent. less than the contract quantity. There is no authority on this point.

THE EARL OF READING C.J. This case raises two substantial points. The first is whether on the facts stated there was in law any frustration or cancellation of the contract. The second is whether the contract quantity in respect of which the sellers could be made liable, if they are liable at all, for non-delivery was 200 tons or 200 tons 5 per cent. more or less, which would give the sellers the option, if that is the true construction of the contract, of delivering only 190 tons—that is, 5 per cent. less than the 200 tons.

With regard to the first question put by the Board of Appeal, whether on the facts stated and found there was in law any frustration or cancellation of the contract, I am of opinion that there was no frustration or cancellation of the contract. This was a sale not of specific goods, but of goods of the particular description mentioned in the contract, but which were in fact unascertained under the contract. Once the conclusion is arrived at that the sale was not of specific goods then the mere fact that the company manufacturing the goods did not produce the full quantity of 200 tons is no answer to the claim made by the buyers in this case against the sellers. The buyers would be entitled to damages unless an implied term could be read into the contract to the effect that the sellers undertook no liability and did not become responsible to the buyers if the company manufacturing the goods did not in fact manufacture the goods whatever the reason might be for the non-manufacture, and even though, as in the present case, the non-manufacture of the goods was because the manufacturing company did not think fit to manufacture during this particular year, so as to complete the quantity specified in the contract. It has been laid down many times that an implied term can only be read into a

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contract if the Court comes to the conclusion that such a term must be implied for the purpose of giving effect to the intention of the parties. That is the view expressed by the House of Lords in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (1), notably in the speech of Lord Loreburn. I do not propose to discuss at any length the principles of law there stated, because in my judgment there can be no doubt that in this case there was no frustration, and no such term can be implied in the contract in this case for the reason that the parties were not contracting with regard to specific goods. As I have indicated already in my opinion once the conclusion is reached, as it must be reached in this case, that it was a sale of unascertained goods of the description stated in the contract it follows that no implied term can be read into the terms of the contract, and that there has been no frustration or cancellation of the contract. Therefore the answer to the first question is in the negative.

The second question is whether clause 8 of the contract operates in law to relieve the sellers from their obligations under the contract. Clause 8 operates in the buyers' favour giving them a right to elect to extend the time for delivery within certain limits prescribed by the clause. The buyers took advantage of this right under the clause and gave due notice and consequently extended the time for delivery of the goods. The effect of the clause is to relieve the sellers from their obligation to deliver within the period prescribed by the contract—that is, during the months between May and August, 1919—provided they could bring themselves within the exceptions in clause 8, one of which was strikes. Inasmuch as the buyers did give the notice that was necessary they are entitled to claim the delivery, but are not entitled to claim damages for the sellers' delay in making the delivery, which delay was occasioned by the strike. No question was put to us in the case with regard to the liability of the sellers for damages for the delay in making delivery, because it seems to be admitted and certainly the Board of Appeal

(1) [1916] 2 A. C. 397, 404, 405.

found that the delay was occasioned by strikes. The answer therefore to the second question is that clause 8 does not relieve the sellers from their obligation to deliver under the contract, although it has operated to the extent of excusing the delay in delivery occasioned by the strike

The third question is whether as a matter of law the arbitrators ought to treat the contract as being a contract for 200 tons, or whether they are at liberty at their discretion to treat it as a contract for 190 tons or 210 tons or any number of tons falling between those limits. The answer to that question is that the contract is for the number of tons specified in the document—that is, for "200 tons, 5 per cent. more or less." That means that the sellers would be performing their obligation under the contract if they delivered 5 per cent. less than the 200 tons or 5 per cent. more than the 200 tons. It is a provision which is inserted into the contract for the sellers' protection, and it gives them a margin within which to deliver, so that they are not bound to deliver exactly 200 tons, but within 5 per cent. of that quantity, whether more or less. Their legal obligation under the contract was to deliver at least 190 tons, and if they had delivered 190 tons they would have performed the contract, that is to say they would have delivered the quantity which could be enforced against them under the contract. In my opinion the damages which can be claimed against the sellers in this case are not damages for non-delivery of 39 tons, the balance between 161 and 200 tons, but for non-delivery of 29 tons allowing for the 5 per cent. less than the 200 tons. Although one is naturally much impressed by the view of the Board of Appeal who are familiar with contracts of this kind I do not think we can give effect to their view that the phrase "5 per cent. more or less" operates only to cover accidental or unimportant variations from the quantity stated in the contract. There could not be an inquiry if the sellers had delivered within 5 per cent. more or less of the 200 tons as to whether the delivery of the 5 per cent. more or less was occasioned by accident or inadvertence or whether it was a deliberate act. The truth is that it was intended by the

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contract to give the sellers an option of delivering either 5 per cent. more or 5 per cent. less than the 200 tons, or any quantity between those limits. In considering what damages the buyers are entitled to for the non-performance by the sellers of their contract, it is clear that the contract cannot be enforced against the sellers beyond the limits of the obligation which they have incurred, and if they would be within the terms of the contract, as I think they would, if they delivered 190 tons, whatever the reason be for delivering that quantity, it follows that the only damages which can be recovered against them are damages for not delivering up to 190 tons and that damages cannot be given against them in respect of any quantity in excess of that quantity. The answer therefore in my judgment to the third question is that the contract must be treated for this purpose as an obligation on the part of the sellers to deliver 190 tons at least, and that if they delivered 190 tons they would have performed the contract.

That deals with the three specific questions put to us by the arbitrators and I think no other question arises on this case.

DARLING J. I agree.

ACTON J. I agree.

Questions answered.

Solicitors for sellers : *Parker, Garrett & Co.*
Solicitors for buyers : *Wm. A. Crump & Son.*

R. F. S.

LONDON AND NORTH WESTERN RAILWAY COMPANY, APPELLANTS *v.* RICKERBY, LIMITED, RESPONDENTS.

1920
Oct. 21.

Railway Company—Carriage of Goods—Rates and Charges—False Account of Weight of Goods—Intent to avoid Payment of Tolls—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 98, 99.

Sect. 99 of the Railways Clauses Consolidation Act, 1845, provides that if a person being the owner or having the care of any carriage or goods passing or being upon a railway give to the collector of tolls or other officer or servant of the company "a false account . . . . with intent to avoid the payment of any tolls payable in respect thereof" he shall for such offence forfeit to the company a certain sum of money:—

Held, that an offence under that section was committed by a consignor who made to the railway company any false statement with regard to the goods to be carried, including a false account as to the weight of the goods, in order to avoid the payment of any tolls payable in respect thereof.

CASE stated by Carlisle justices.

An information was preferred on behalf of the appellants under ss. 98 and 99 of the Railways Clauses Consolidation Act, 1845 (1), against the respondents for that they on

(1) Railways Clauses Consolidation Act, 1845, s. 98: "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls."

Sect. 99: "If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account, with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding

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January 30, 1920, being the owners, or having the care of certain goods which were about to travel upon the London and North Western Railway, did unlawfully give to the collector of tolls or other servant of the appellants, at the place where he attended for the purpose of receiving goods or collecting tolls, a false account of the goods with intent thereby to avoid payment of tolls payable in respect thereof.

The summons issued in respect of the information charged the respondents with unlawfully giving to the collector of tolls a false account of the weight of the goods, with intent thereby to avoid payment of the tolls payable in respect of the goods.

The respondents were a firm of agricultural engineers in Carlisle, and from time to time consigned goods by the appellants' railway. At the hearing of the information it was stated on the appellants' behalf and, for the purposes of the special case only, not disputed by the respondents, that the false account alleged to have been given was in connection with the weight of a consignment of goods as given on a consignment note filled up by a servant of the respondents, and handed to the appellants' servant at or about the time the goods were received by the appellants' servant. It was also stated on the appellants' behalf and for the purposes of the special case only, not disputed by the respondents, that on January 30, 1920, the appellants received from the respondents one dust extractor, with pulley complete, consigned by the appellants' railway to Leigh, Lancashire, and that the appellants also received from the respondents the said consignment note giving the weight of the goods as 1 cwt. 3 qrs., and that when the goods were subsequently checked by the appellants their weight was found to be 3 cwt. Payment for the carriage of such goods varies according to their weight. The consignment note was, or

ten pounds for every ton of goods, or for any parcel not exceeding one hundredweight, and so in proportion for any less quantity of goods than one ton, or for any parcel exceeding one hundredweight, (as the case may be,) which shall be upon any such carriage; and such penalty shall be in addition to the toll to which such goods may be liable."

purported to be, the account required from the respondents and given by them to the appellants in accordance with ss. 98 and 99 of the Act of 1845. No other account in writing or otherwise with regard to the goods was given to the appellants by the respondents. On the goods as so consigned the respondents paid to the appellants the sum of 6*s.* 10*d.* by way of tolls or charges, whereas had the weight been correctly given as 3 cwt. the tolls or charges due from the respondents would have been 10*s.* 10*d.*

On the hearing of the summons it was contended on behalf of the respondents as preliminary points of law: (*a*) that the summons disclosed no offence as it was in respect of a false account of the weight of goods and not in respect of a false account of goods; (*b*) that on the case as put before the justices there was no offence in that the giving of a false weight was not the giving of a false account within the meaning of s. 99 of the Railways Clauses Consolidation Act, 1845, even if it was done with intent to avoid payment of tolls or charges; (*c*) that the information and summons did not follow the words of the Act and disclosed no offence.

On behalf of the appellants it was contended: (*a*) that the words "of the weight" in the summons were merely words of surplusage more accurately describing the nature of the offence; (*b*) that the giving of a false weight on the consignment note constituted the giving of a false account within s. 99 of the Act of 1845; (*c*) that if false weights were given on the consignment note with intent to avoid payment of tolls or charges an offence against the section was committed; (*d*) that what the justices had to consider was whether false weights were given with that intent and that if so they ought to convict the respondents; (*e*) that it was only possible to determine that question after hearing the evidence. It was further submitted that the justices had power to amend the summons if and so far as was necessary, and it was suggested that the justices should amend the same, if they considered it necessary so to do, by striking out the words "of the weight."

The justices, without hearing evidence on the merits,

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dismissed the information and summons on the preliminary objection raised by the respondents, holding: (*a*) that the information disclosed no offence on the part of the respondents; (*b*) that the giving of false weights on the consignment note, if in fact given, did not constitute the giving of a false account within the meaning of s. 99 even if done with the intent to avoid payment of tolls; (*c*) that even if an intent to avoid payment of tolls was proved they ought still to dismiss the information.

The justices considered the suggested amendment of the summons but were of opinion that it was unnecessary, as even if it were done no offence would have been disclosed for the reason already given. The justices stated that they should have granted such an amendment as was necessary if they had considered an offence had been committed.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

Eustace Hills K.C. (*Singleton* with him) for the appellants. The justices were wrong in holding that the misdescription by the respondents on the consignment note of the weight of their goods given with intent to avoid payment of tolls was not the giving of a false account within s. 99 of the Railways Clauses Consolidation Act, 1845. Sect. 98 of that Act imposes upon the owner of goods an obligation to give to the railway company carrying the goods an exact account in writing of the number or quantity of goods conveyed. Sect. 99 makes the non-giving of that account an offence, but it also makes the giving of a false account with intent to avoid payment of tolls an offence, this latter offence includes the giving of a false account as to the weight of the goods conveyed. The amount payable as tolls for the carriage of goods is determined by the weight and description of the goods. In *Barr, Moering & Co.* v. *London and North Western Ry. Co.* (1) a consignment note had been given by the consignors to the railway company in which the goods had

(1) [1905] 2 K. B. 113.

been misdescribed by them with the object of procuring the carriage of the goods at a lower rate than would have been charged if they had been correctly described, and it was held that the consignors had been guilty of the offence under s. 99 of the Act of 1845 of giving a false account of the goods with intent to avoid the payment of the tolls in respect thereof. It was contended in that case, but without success, that the only obligation on the consignor was to give an account of the number or quantity of the goods and that there was no obligation to give a description of the goods, and that the false description of the goods in the consignment note was mere surplusage.

[He was stopped.]

Hildesley for the respondents. The offence with which the respondents were charged is an offence created by s. 98 of the Act of 1845—namely, the offence of not giving an exact account of the number or quantity of the goods conveyed. Sect. 99 merely deals with the penalty for that offence and does not create a substantive offence. Under s. 98 all that a consignor has to do is to give the number or quantity of the goods conveyed. The word "quantity" in that section does not include weight. Sect. 99 first of all imposes a penalty upon the consignor if he wholly fails to give the account required by s. 98, it then goes on to impose a penalty upon the consignor if he gives a false account—namely, if he does not give a correct account of that which s. 98 imposes upon him an obligation to furnish. Those words however do not create a different offence from that created by s. 98. It is true that the word "quantity" is used in the latter part of s. 99 as meaning weight, but it is only used there in an attempt to make the punishment fit the offence. After the offence has been committed the goods have to be weighed in order to ascertain the amount of the penalty, as the amount of the penalty depends upon the weight of the goods. Sect. 101 provides that "if any difference arise . . . . respecting the weight, quantity, quality or nature of such goods," and therefore the word "quantity" is used in that section in the same sense as in s. 98 as not including weight. All that the

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decision in *Barr, Moering & Co.* v. *London and North Western Ry. Co.* (1) amounted to was that s. 98, having regard to its wording, imposed an obligation upon the consignor to give a description of the goods. But the number and quantity of goods cannot be stated in a consignment note unless the description of the goods is also stated, and further, the concluding words of the section impose an obligation to give a description of goods. That decision has no bearing upon the question whether there is an obligation upon the consignor to give a correct account of the weight of goods.

[*Great Southern and Western Ry. Co.* v. *Wallace Bros.* (2) was also referred to.]

The Earl of Reading C.J. The London and North Western Railway Co. laid an information and a summons was thereupon issued charging the respondents, Rickerby, Ld., with unlawfully giving to the collector of tolls of the railway a false account of the weight of the goods about to be carried with intent thereby to avoid payment of the tolls payable in respect of the goods. The sole question with which we have to deal on the case as stated is whether or not the giving by the respondents to the railway company of the consignment note in question, which contained statements said to be false and which for the purpose of this case we assume to have been intentionally false and to have been made with intent to avoid payment of tolls, constitutes an offence. It must not be taken that these facts have been proved against the respondents; they are merely assumed for the purpose of deciding the point of law, and all the facts and circumstances will have to be dealt with by the justices when the case goes back to them.

The real question in this case is whether when a consignor delivers goods to a railway company for carriage by the railway company, the giving by him to the company of a consignment note in which the number of the article is stated correctly but the weight of the article is stated incorrectly, when the amount of the toll payable depends on the weight

(1) [1905] 2 K. B. 113. (2) (1913) 15 Ry. & Can. Traff. Cas. 75.

of the article, assuming that the consignor knew that the statement as to the weight was untrue when he made it and that he made the statement deliberately with the object of avoiding payment of the right amount for the carriage of the goods, constitutes an offence. Sect. 99 of the Railways Clauses Consolidation Act, 1845, leaving out the immaterial words, provides that "if he"—that is, the owner or other person having the care of any goods passing or being upon the railway—"give a false account . . . . with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company" a certain sum. Those words, without reference to other sections, would clearly include the case of a consignor who gives a false statement as to the weight of the goods to be carried in order to lower the charge to be made against him. Indeed that cannot be controverted; the language of the section is too plain. The argument put before us by Mr. Hildesley however is that in order to arrive at a reasonable interpretation of the words "a false account" they must be read together with s. 98 and s. 101, and that the effect of reading those sections together would be to denote that when Parliament said "or if he give a false account," it meant to enact that if a consignor give a false account as to the number or quantity of the goods to be carried he would commit an offence and that Parliament did not intend to include within that offence the giving of a false account as to weight. I can, however, find nothing in the language of those sections which should lead us to that conclusion. Indeed I can see very good reasons why Parliament, when protecting railway companies against the omission to make the statements required under s. 98, or the giving of false statements, by the imposition of a penalty, should have enacted that that penalty should equally apply to any person who for the purpose of reducing the amount of the tolls properly payable to the railway company makes untrue statements deliberately so as to deceive them. On the ground of wide general policy there seems no reason why Parliament should not have so provided, indeed there is every reason why they should have

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so provided. It seems to me therefore that it was intended to include in the words "false account" any false statement made with regard to the goods to be carried so as to lower the tolls which otherwise would be chargeable. I see no difficulty in so construing the words either from a consideration of the sections before us or from a consideration of the general policy of the Legislature. Indeed we should be bound to give these words a wide interpretation unless we could find in this section or in other sections language which constrained us to limit the general application of these words, or unless it was clear, having regard to the whole scope and policy of this Act of Parliament, that we must come to the conclusion that Parliament did not intend that the words should apply as generally as they would do if the other interpretation were placed upon them. I find nothing either in the statute or in the particular section to lead me to that conclusion, and to my mind that is sufficient for the decision of the point before us, which is purely a point of law. For these reasons I am of opinion that the appeal must be allowed and the case remitted.

DARLING J. I am of the same opinion.

ACTON J. I agree.

Appeal allowed.

Solicitor for appellants : *M. C. Tait.*

Solicitors for respondents : *Speechly, Mumford & Craig, for Saul & Lightfoot, Carlisle.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.
1920
Oct. 22.

In re No. 4, PORCHESTER GATE, PADDINGTON.

JOHNSTON *v.* MACONOCHIE AND OTHERS.

Local Government—Housing—Conversion of House into Flats—Flats unsuitable for Persons of Working Class—Restrictive Covenant—Jurisdiction of County Court to vary Covenant—Housing, Town Planning, &c., Act, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 27.

Sect. 27 of the Housing, Town Planning, &c., Act, 1919, provides: "Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which such house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements and that, by reason of the provisions of the lease or of any restrictive covenant affecting the house or otherwise, such conversion is prohibited or restricted, the Court, ... may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted. . . . ."

Held, that that section is not confined to houses which if converted into tenements could readily be let for occupation by persons of the working class, but is of general application, and applies where the house if converted could be let for occupation by persons of any class.

Decision of the Divisional Court [1920] 3 K. B. 417 affirmed.

APPEAL from the decision of a Divisional Court. (1)

By an indenture dated March 16, 1920, and made between the personal representatives of J. L. Margerison, of the one part, and James S. Johnston, of the other part, which recited an agreement for the sale by the former to the latter of the house thereby assured subject as therein provided, the parties of the first part, in consideration of 5000*l.* granted to the said J. S. Johnston the house No. 4, Porchester Gate, Paddington, in the county of London, to hold unto and to the use of him his heirs and assigns for ever, subject to and with the benefit of a mutual covenant contained in indentures of earlier date by one of which the then owner of the above-mentioned house and the then owner of the houses Nos. 3, 6 and 7, Porchester Gate, as to each of these houses,

(1) [1920] 3 K. B. 417.

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and by another of which the then owner of the above house and the owner of No. 8, Porchester Gate, mutually covenanted that no alteration should be made in the architectural elevation of that portion of the said mansions respectively which fronted on the Uxbridge Road and further that the said mansions respectively should not be used for a school or boarding house or for any trade or business or "otherwise than as a private residence."

J. S. Johnston desired to convert the house into four self-contained private residential maisonettes or flats, but being in doubt as to the effect of the above-mentioned covenant he made an application to the county court under s. 27 of the Housing, Town Planning, &c., Act, 1919 (1), claiming that the covenant might be varied so as to enable the conversion to be effected.

The respondents to the application were the owners of the neighbouring houses who were entitled to the benefit of the covenant.

On April 1, 1920, the application was heard in the county court. It then appeared that with the exception of Mr. A. W. Maconochie, the freeholder of No. 8, Porchester Gate, each of the respondents had given his or her consent to the proposed conversion of the applicant's house into flats.

Evidence was brought on behalf of J. S. Johnston to show that formerly the house in question and the other houses in Porchester Gate and its vicinity were all occupied by persons of means and social position, the selling price of the houses being then from 8000*l.* to 10,000*l.* each; that within the last ten years or thereabouts the neighbourhood had become less popular with persons of that class, and its character had consequently changed, some of the houses having been converted into hotels or boarding houses, others having been divided into flats, and others remaining empty, and the selling prices having fallen; that the rateable value of these houses was about 360*l.*; that the house in question had been empty for three years, that it would be very difficult to let it as a single dwelling house, but that if it were

(1) The section is set out in the headnote.

converted into residential flats these could readily be let; that J. S. Johnston had purchased the house in question for 5000*l.*, and that he desired to convert it into four maisonettes or flats, one of which he would occupy himself and the others of which he hoped to let for 350*l.* or 400*l.* a year in all.

On behalf of the respondents the objection was taken that the county court had no jurisdiction under s. 27 to grant the application, inasmuch as, read in connection with the rest of the Act, that section on its true construction only applied where it was shown that the house if converted into tenements could readily be let for occupation by persons of the working class, and here it was obvious that the proposed flats would not be suitable for persons of that class.

The county court judge, without hearing the respondents' case on the merits, held that s. 27 gave him no jurisdiction and dismissed the application. On appeal the Divisional Court (Salter and Roche JJ.) reversed this decision and sent the case back to the county court to be heard on the merits.

A. W. Maconochie appealed.

B. L. O'Malley (*Disturnal K.C.* with him) for the appellant contended as in the Court below that s. 27 of the Act only applied to a house which after conversion into tenements could be readily let for occupation by the working classes. He based his argument chiefly on the fact that s. 27 occurs in the first part of the Act, headed Part I., which contains forty-one sections grouped under the title "Housing of the Working Classes."

Holman Gregory K.C., *Foà* and *R. W. Turnbull* for the respondent were not called upon.

BANKES L.J. The decision of the Divisional Court was right. Notwithstanding the view of the learned county court judge, whose opinion I greatly respect, I think this is a plain case. The Act of 1919 was passed when the want of housing accommodation for all classes was very acute, and attention had been called to the fact that in some localities there were large houses actually affording accommodation to no one on account of the expense of maintaining them, and

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subject to restrictive covenants which prevented them from being converted into smaller tenements and so made available for many families of moderate means, who were in consequence found living in houses adapted for the working classes. If accommodation elsewhere could be found for those persons more room would be available for the working classes. Part I. of the Act undoubtedly deals with housing of the working classes. It speaks of "houses for the working classes," of houses "suitable as houses for the working classes," and houses "intended or used for occupation by the working classes"; and the draftsman when he intends houses of that description qualifies "houses" by some such words as those. But in s. 27 "house" is used without any qualification whatever. The word must be given its ordinary meaning unless there is some ambiguity in the way in which it is used. Mr. O'Malley searched carefully for some ambiguity, but failed to discover any. The section is free from ambiguity. The limitations carefully imposed on the meaning of the word in other sections are omitted in this section, and there is ample justification for applying its provisions to houses generally although it occurs in Part I. of the Act which deals with the housing of the working classes. The wide power given to the county court judge indirectly benefits the working classes, although applicable to houses occupied by other classes, for by providing accommodation for the latter it indirectly affords housing for the former. The appeal must be dismissed.

SCRUTTON L.J. I am clearly of opinion that the appeal fails.

ATKIN L.J. I am of the same opinion. I see no reason for confining the word "house" in s. 27 to dwelling house. It might well include a block of offices suitable for conversion into dwelling houses.

Appeal dismissed.

Solicitor for appellant: *F. J. Perks.*

Solicitors for respondents: *Lee & Pembertons.*

W. H. G.

BERESFORD AND ANOTHER, APPELLANTS *v.* RICHARDSON, RESPONDENT.

1920
Oct. 26.

Motor Car—Driving—Manner dangerous to the Public—Excessive Speed—Offence—Evidence—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 1.

Each of the appellants drove a motor charabanc at a speed in excess of the speed limit on a public highway for a distance of two miles, within which distance there were fifteen roads converging on the highway, making at one point dangerous crossroads, and two railway stations with entrances abutting on the highway. The appellants were charged under s. 1, sub-s. 1, of the Motor Car Act, 1903, with having driven in a manner dangerous to the public having regard to all the circumstances of the case, including the nature, condition and use of the highway and to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the highway.

The appellants were convicted.

Held, that there was evidence to support the conviction, notwithstanding that the evidence showed that the appellants might also have committed the offence of driving at a speed which was dangerous to the public.

Rex v. *Wells* (1904) 91 L. T. 98 explained.

CASE stated by justices for the county of Chester.

At a Court of summary jurisdiction an information was preferred by the respondent, a superintendent of police, against the appellant Beresford, and another information was preferred against the appellant Tattersall, charging respectively that each of the appellants on April 5, 1920, unlawfully did drive a motor charabanc on a public highway called Chester Road in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the highway and to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the highway, contrary to s. 1, sub-s. 1, of the Motor Car Act, 1903. (1)

(1) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1: "(1.) If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

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The two informations were heard together and the facts proved or admitted were as follows :—

From Heyeswood Lodge to a point on Castle Hill both on Chester Road the measured distance is exactly two miles. In that distance fifteen roads converge on Chester Road making at one point dangerous crossroads, and there are two railway stations the entrances to which abut on the said highway.

April 5 was Easter Monday and consequently there was a large number of foot passengers, bicycles and vehicles of different descriptions proceeding in both directions along the highway.

The appellants were in the employment of the Glossop Carriage Co., Ld., and were each driving a motor charabanc, the property of the company, from Chester to Glossop along the highway in the evening of April 5. The appellant Tattersall was driving the first charabanc, and the appellant Beresford was driving the second charabanc close behind the first.

The charabancs were each fitted with rubber tyres and the maximum speed at which they were entitled to travel under art. 7 of the Heavy Motor Car Order, 1904, was twelve miles an hour. There are no special regulations as to speed for the area.

A police constable was stationed at Heyeswood Lodge and a second police constable was stationed at the point on Castle Hill above mentioned each with a stop watch for the purpose of noting at what time any motor charabanc passed him and each constable noted the time at which the charabancs driven by the appellants passed him and on subsequently comparing the times as recorded by their stop watches (which were properly synchronised) it was found that the appellants had traversed the measured distance of two miles in 6 minutes and 45 seconds, being at the rate of $17^{7}/_{9}$ miles an hour.

No warning at the time was given to the appellants of an intended prosecution or otherwise, nor were they stopped, and apart from the speed at which the appellants were proceeding there was nothing else in the manner in which the appellants

were driving the charabancs or otherwise in their conduct likely to cause danger, and both the appellants were experienced drivers.

Evidence was given on behalf of the appellants to negative the evidence given on behalf of the respondent that the appellants had driven to the danger of the public by exceeding the speed limit fixed by art. 7 of the Heavy Motor Car Order, 1904.

It was contended on behalf of the appellants that although the speed at which they were driving was an element which must be taken into account: see *Hargreaves* v. *Baldwin* (1) and *Elwes* v. *Hopkins* (2), yet if the only evidence was that the speed was excessive under art. 7 of the Heavy Motor Car Order, 1904, it was insufficient to support a conviction for the offence charged, which was a different offence from exceeding the speed limit or from driving at a speed which was dangerous to the public within the meaning of s. 1, sub-s. 1, of the Motor Car Act, 1903.

The justices held that to exceed the speed limit was in itself, having regard to all the circumstances of the case and the amount of traffic which was actually at the time, or which might reasonably be expected to be, on the highway, driving in a manner dangerous to the public within the meaning of s. 1, sub-s. 1, and they accordingly convicted the appellants.

The question for the opinion of the Court was whether the justices were right in so holding.

Ashton K.C. and *R. Sutton* for the appellants. There was no evidence on which the justices could find that the appellants had committed the offence charged—namely, driving in a manner dangerous to the public, though it may be admitted that there was evidence that they were driving at a speed which was dangerous to the public. It was decided by this Court in *Rex* v. *Wells* (3) that driving at a speed, and driving in a manner, dangerous to the public are two distinct

(1) (1905) 93 L. T. 311. (2) [1906] 2 K. B. 1.
(3) 91 L. T. 98.

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offences, and it follows that if a man is charged with committing one of these two offences and the evidence shows that he has committed the other offence, he cannot be convicted. No doubt speed may be an element to be considered when deciding whether the manner of driving is dangerous, but if the evidence shows that the speed was dangerous and nothing more the offence of driving in a manner dangerous to the public has not been committed.

R. Burrows (*Austin Jones* with him) for the respondent was not called upon to argue.

THE EARL OF READING C.J. stated the facts as set out in the case, and continued: On these facts the justices convicted the appellants. It is contended on behalf of the appellants that the conviction is wrong on the ground that the evidence only established that the appellants were driving at a speed in excess of that permitted by art. 7 of the Heavy Motor Car Order, 1904, and that there was no evidence that the appellants were driving in a manner dangerous to the public which was the offence charged against them. I do not think there is any substance in this point. If the case against the appellants had merely been that they were driving in excess of the speed limit there would have been some force in the argument, but on the facts found by the justices they were enabled to say that the driving was in a manner dangerous to the public. The material words of s. 1, sub-s. 1, of the Motor Car Act, 1903, are: "drives . . . . in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway." There was evidence that the portion of the road on which the appellants were driving contained dangerous crossroads, and that there was a considerable amount of traffic, the day being a bank holiday. There was, therefore, in my opinion evidence on which the justices could come to the conclusion that the appellants were driving in a manner dangerous to the public.

Reliance was also placed on *Rex* v. *Wells*. (1) In that case the appellant was convicted for driving at a speed or in a manner dangerous to the public. The Court held that the conviction was bad for duplicity, because there was nothing to show of which offence the appellant had been convicted, but the Court did not say that on the facts proved the appellant could not have been convicted of either offence. In my opinion it is quite possible that the same facts might constitute an offence under both branches of the section and there is nothing in the judgment of Lord Alverstone C.J. in *Rex* v. *Wells* (1) to lead me to think that that was not his view also.

This appeal must therefore be dismissed.

DARLING J. I am of the same opinion. The decision in *Rex* v. *Wells* (1) has given rise to some trouble but it is not conclusive of this case. All that was decided in *Rex* v. *Wells* (1) was that if it is intended to charge two separate offences they must be charged in separate summonses. It does not follow that a man cannot commit two offences at one time. For example, if a man drives at an excessive speed and at the same time in zig-zags across the road, he is driving both at a speed, and in a manner, dangerous to the public, and is committing two offences. But if all that he does is to drive at a speed which is dangerous to the public, cannot it be said that he is also driving in a manner dangerous to the public? If it can, this conviction should be upheld. To treat these two matters as entirely disjunctive is to treat manner as synonymous with method, that is, driving in some manner peculiar to the particular individual. I do not think the section should be read so narrowly as that. The language of the section is not language of precision; it uses in contradistinction the words "recklessly or negligently," whereas it is clear that if driving is reckless it must also be negligent; and so also with regard to speed and manner, I do not think the section means that speed is necessarily different from manner. If a man drives at fifty miles an hour in a crowded

(1) 91 L. T. 98.

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thoroughfare it would be impossible to say that he was not driving in a dangerous manner. The question as to the manner in which a man is driving depends on all the circumstances existing at the time, and the pace, the condition of the road and the presence of members of the public are all matters to be taken into consideration when deciding whether the manner of driving was dangerous to the public.

I think that on the facts found by the justices in this case the conviction can be justified, notwithstanding anything that was said in *Rex* v. *Wells*. (1)

SALTER J. I agree. *Appeal dismissed.*

Solicitors for appellants: *Rochester Pusey & Co., for T. A. Needham, Manchester.*

Solicitors for respondent: *Rawle, Johnstone & Co., for R. Potts, Chester.*

F. O. R.

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Oct. 27.

THE KING *v.* RICHMOND CONFIRMING AUTHORITY. *Ex parte* HOWITT.

Licensing Acts—Grant of Licence—Death of Licensee before Confirmation—Confirmation to substituted Person—Jurisdiction—Person aggrieved.

An application was made to licensing justices by T., the assistant secretary of L. & Co., for a licence for the sale of intoxicating liquor in respect of premises occupied by L. & Co. as a restaurant. The application was opposed by H., the licensee of other premises in the same borough, but was granted by the licensing justices. Before the confirmation of the grant T. died. At the meeting of the confirming authority an application was made to confirm the grant but to substitute in the licence the name of B., the secretary of L. & Co., for that of T. This application was opposed by H. on the ground that the confirming authority had no jurisdiction to grant it; but the application was nevertheless granted. A rule for a certiorari having been obtained by H. to bring up the order of the confirming authority:—

Held, that the confirming authority acted in excess of its jurisdiction, that H. was a person aggrieved thereby, and that as such he was entitled to the writ ex debito justitiæ.

Rex v. *Groom, Ex parte Cobbold* [1901] 2 K. B. 157, 162 followed.

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(1) 91 L. T. 98.

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RULE NISI for certiorari to bring up certain orders or certificates made or given by the Richmond confirming authority.

On March 2, 1920, an application by a Mr. Taylor, then assistant secretary to J. Lyons & Co., Ld., for the grant of a full licence in respect of certain premises in Richmond occupied by Messrs. Lyons as a restaurant came before the Richmond licensing justices. The application was opposed by Mr. Howitt, the licensee of the Castle Hotel, Richmond, and proprietor of an unlicensed restaurant in Richmond. The licensing justices granted the licence. On March 25 Taylor applied to the confirming authority for confirmation of the grant. This application was opposed by Howitt, and as the justices constituting the confirming authority were equally divided the grant to Taylor was not confirmed. On May 6 a rule nisi for a mandamus was obtained on behalf of Taylor directed to the confirming authority, requiring them to hear and determine his application for a confirmation of the licence, and the rule was made absolute on June 9. On July 5 the confirming authority again sat to deal with the application, but between the date of the issue of the writ of mandamus and July 5 Taylor died. The confirming authority (which included the whole of the justices who had granted the licence) were informed of this fact, and of the further fact that Taylor's executrix had executed a declaration of trust of all the interest which Taylor had in the licence in favour of Messrs. Lyons, and were asked to confirm the grant, but to substitute for Taylor's name that of Mr. Booth, who was the secretary of Messrs. Lyons. Objection was taken by counsel on behalf of Howitt that the confirming authority had no jurisdiction to do this, but the confirming authority confirmed the grant made on March 2 and substituted the name of Booth for that of Taylor. This rule was then obtained by Howitt on October 12.

Sir John Simon K.C. (*G. Cecil Whiteley* with him) showed cause. The applicant is seeking to take advantage of what at most is a highly technical irregularity, and where the Court

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is satisfied that no substantial injustice has been done it will not make the rule absolute: *Reg.* v. *Rogers.* (1) The applicant cannot be treated as an aggrieved person because the name of one official in the employment of Messrs. Lyons has been substituted for that of another, however irregular the substitution may have been.

[THE EARL OF READING C.J. We want to be satisfied that in this case the writ is not ex debito justitiæ. Where it appears on the face of the licence that there has been an excess of jurisdiction, is the Court not bound to grant the writ?]

There are cases in which the Court must issue the writ and cases in which the Court has a discretion. The test is not whether there has been some irregularity in the proceedings, but whether the applicant for the writ is a person aggrieved by what has been done: *Reg.* v. *Surrey Justices* (2); *Reg.* v. *Nicholson.* (3) In this case the applicant is not a person aggrieved.

[THE EARL OF READING C.J. The applicant opposed both the application for the licence and the confirmation. Is he not aggrieved by the usurpation of jurisdiction by the confirming authority?]

No. Suppose that instead of being a licensee in Richmond, the applicant had been a resident in Bristol. The irregularity would have been precisely the same, but he would clearly not be a person aggrieved and the Court would not interfere. Where the applicant's grievance is like that of other subjects the writ will not go as of right: per Vaughan Williams L.J. in *Reg.* v. *Nicholson.* (3) The Court does not sit to correct irregularities in proceedings before justices at the instance of any one who thinks they ought to be corrected. The fact that the applicant is a rival licensee does not entitle him to the writ as a person aggrieved: *Rex* v. *Middlesex Justices* (4); *Reg.* v. *Surrey Justices* (5); *Reg.* v. *Rogers.* (1) It is true that in *Rex* v. *Groom, Ex parte Cobbold* (6), certain brewers

(1) (1892) 56 J. P. 183, 185.
(2) (1870) L. R. 5 Q. B. 466.
(3) [1899] 2 Q. B. 455, 470, 471, 472.
(4) (1832) 3 B. & Ad. 938.
(5) (1888) 52 J. P. 423.
(6) [1901] 2 K. B. 157.

owning public-houses in a borough were held to be persons aggrieved in respect of a grant of another licence within the borough, but the attention of the Court was not there called to the earlier authorities where the contrary view was expressed. Moreover, the actual decision in that case is no longer law.

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There is a further ground why the Court should refuse to make the rule absolute, and that is on the ground of delay. The decision of the confirming authority was given on July 5 and the rule was not moved till October 12. That delay is a good ground for the Court refusing to issue the writ is clear: see *Reg.* v. *Sheward* (1) and *Reg.* v. *Nicholson.* (2)

Macmorran K.C. (*Eustace Fulton* with him) in support of the rule. The applicant as a rival licensee has a sufficient interest to entitle him to say that he is a person aggrieved by the confirmation of this licence: *Reg.* v. *Groom, Ex parte Cobbold.* (3) There the point was definitely taken. In this case the applicant took objection to the jurisdiction of the confirming authority. He is not in the position of an ordinary member of the public; he has a particular interest in the matter. As to the second point, the delay arose by reason of the difficulty of getting the necessary documents owing to the absence on holiday of the justices' clerk. Moreover, r. 21 of the Crown Office Rules provides that an application for certiorari must be made within six months of the order complained of, and it is submitted that mere delay within the six months does not take away the applicant's right to the writ.

[He was stopped.]

THE EARL OF READING C.J. On March 2, 1920, an application by a Mr. Taylor, who was the assistant secretary of J. Lyons & Co., Ld., for a licence in respect of premises in Richmond which Messrs. Lyons owned and where they carried on a restaurant, came before the Richmond licensing justices. At the hearing there was opposition by the applicant,

(1) (1880) 9 Q. B. D. 741. (2) [1899] 2 Q. B. 455, 470, 472.
(3) [1901] 2 K. B. 157.

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Mr. Howitt, who is the licensee of the Castle Hotel, Richmond, and is also the proprietor of a restaurant. The applicant was entitled to oppose, he being a person who had an interest, in the sense that he was the owner or licensee of property in the borough which he thought would be affected adversely by the grant of a licence to Messrs. Lyons. The applicant was heard and the justices decided against him and granted the licence. On March 25 the confirming authority met, but the justices constituting it were equally divided. This Court then granted a mandamus to the confirming authority to hear and determine the application for the confirmation of the licence, and on July 5 the matter came again before the confirming authority. But on June 11, shortly after this Court granted the mandamus, Taylor died. Consequently there was really no licence to confirm. Counsel appeared on behalf of the applicant and opposed the confirmation both on the general ground that Messrs. Lyons would be competitors of the applicant, and also on the ground that the confirming authority had no jurisdiction to confirm the licence to Booth, the person proposed to be substituted for Taylor in the grant. It was said that the authority's jurisdiction was merely to confirm the licence granted to Taylor and that they could not do, because Taylor was dead. The confirming authority, nevertheless, confirmed the grant, substituting Booth's name for that of Taylor. That was clearly a usurpation of jurisdiction. The applicant's point was good and the confirming authority ought to have declined to make the order. That as I have said was on July 5. On October 12, on the reassembling of the Courts, application was made on behalf of the applicant for a rule nisi for certiorari to bring up the confirming authority's order. The affidavit on which the rule was obtained was dated September 20, and the facts, as we now know them, were that, after the order of July 5, application was made to the justices' clerk for the necessary documents to make the application, but that owing to his absence the papers were not obtained till September. Three weeks later the application for the rule came before this Court.

It is admitted that the confirming authority in confirming the licence to Booth acted in excess of its jurisdiction. But Sir John Simon, in showing cause, takes the point that, notwithstanding that excess of jurisdiction, this Court ought not to interfere by making the rule absolute for certiorari. It is said first, that the applicant does not apply ex debito justitiæ but can only ask the Court to exercise its discretion as to granting the writ and, secondly, that even if the Court thinks that he can apply ex debito justitiæ it should nevertheless say that the delay that has taken place since the confirmation of the licence should induce the Court to refuse to make the rule absolute.

The first point turns entirely upon the question whether the applicant can be said to be a person aggrieved. I do not propose to enter into an exhaustive discussion of the principles which govern this Court in granting the writ of certiorari ; I intend to confine myself to the actual case before us. The applicant does not, in my opinion, stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter, and nothing can better show this than the fact that he incurred the expense of instructing counsel to secure if he could the refusal of the confirmation, and to contend that the confirming authority had no jurisdiction. Bearing in mind that the applicant is a person who was entitled to appear and object as having this interest that he was carrying on business as the licensee of premises in Richmond, I think the case comes within the decision of *Rex* v. *Groom, Ex parte Cobbold*. (1) There the very point was taken that the rule for certiorari to quash an order of the licensing justices had been obtained by rivals in trade and that, as such, they were not persons aggrieved. On the other side it was contended that they were persons aggrieved as persons who had an interest in the matter of the application for the licence and therefore entitled to the writ of certiorari. Lord Alverstone C.J. indicated that if he could have decided the case

[(1) [1901] 2 K. B. 157.

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merely on the grounds of sympathy—there was not much merit in the application—he would have held that the Court ought not to make the rule absolute, but he said this (1): "As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a certiorari are required to be persons aggrieved. It is sufficient if they have a real interest in the decision of the justices, and they have in this case. They took the point now raised before the justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule." Lawrance J. agreed. It is said that although the decision in that case is a very formidable one against the view contended for on behalf of Messrs. Lyons, the Court which gave the decision had not before it all the authorities to which our attention has been called. But the Court had before it the case of *Reg.* v. *Surrey Justices* (2) where, as the headnote shows, the Court held that "though a certiorari is not a writ of course, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ ex debito justitiæ." In the judgment of the Court in that case, delivered by Blackburn J., it is said (3) in discussing this very question whether the writ is of course or is discretionary, "in the very analogous case of prohibition a distinction is taken, thus expressed by Cockburn C.J., in *Forster* v. *Forster* (4): 'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that it is not ex debito justitiæ, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a

(1) [1901] 2 K. B. 162.
(2) L. R. 5 Q. B. 466.
(3) Ibid. 472.
(4) (1863) 4 B. & S. 187, 199.

party aggrieved, who is entitled to relief ex debito justitiæ, if he suffers from the usurpation of jurisdiction by another Court.' " In the present case the applicant has suffered by the usurpation of jurisdiction by the confirming authority, inasmuch as his objection was overruled by that authority in the sense that they said they had jurisdiction when he said they had not. He was entitled to raise the point, and consequently he suffered from the usurpation when they decided against him.

In *Reg.* v. *Nicholson* (1) to which our attention was also called I can find nothing really contrary to this. A. L. Smith L.J. said (2): " But, assuming certiorari to be the fitting remedy, as a matter of discretion the certiorari ought not to go. First, on the ground of delay . . . . ; and, second, on the fact that the applicants have not shown, as it appears by *Reg.* v. *Surrey Justices* (3) they should have shown, that they have a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public." I believe that to be the true principle upon which this Court acts. Here the applicant had an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered. Although Vaughan Williams L.J. in *Reg.* v. *Nicholson* (1) uses language which seems to draw a distinction between the case where the writ is granted ex debito justitiæ and the case where a person although aggrieved may nevertheless not be entitled to the writ ex debito justitiæ, I do not think that anything he said affects the case before us. Here the whole question is whether the applicant is a person aggrieved in the sense explained by A. L. Smith L.J. in *Reg.* v. *Nicholson* (4) and also by Lord Alverstone C.J. in *Rex* v. *Groom, Ex parte Cobbold.* (5) The question whether a person has a particular interest in the subject-matter as distinguished from the interest which the general public has must always be a question of degree. Of course it may be that a person's interest is so slight that the

(1) [1899] 2 Q. B. 455.
(2) Ibid. 470.
(3) L. R. 5 Q. B. 466.
(4) [1899] 2 Q. B. 455, 470, 471.
(5) [1901] 2 K. B. 157, 162.

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Court will not act upon it, but where, as here, it is substantial the Court is bound to issue the writ when it appears on the face of the order that there has been a wrongful exercise of jurisdiction in the sense of an excess of jurisdiction. The first point taken by Sir John Simon therefore fails.

As to the second point, which is based upon delay, it is enough to say that no case is made out which would justify us in refusing to make the rule absolute whatever may be the true view of the effect of delay when the writ goes ex debito justitiæ. On the facts there is nothing sufficiently shown to raise the point of law argued by Sir John Simon, and it is not desirable to give a decision in express terms where the point does not really arise. As this point also fails, the rule must be made absolute.

DARLING J. I agree. Some confusion appears to have been introduced into this subject in consequence of the language used by Vaughan Williams L.J. in *Reg.* v. *Nicholson.* (1) He there said (2): "This matter is dealt with by Blackburn J. in *Reg.* v. *Surrey Justices* (3) where an illustration of a person entitled as of right to the writ is given in the case of a person who has been deprived of an office. But, besides the case of an aggrieved person who applies as of right for the writ, there is another case in which the Court has regard to the question whether the applicant is an aggrieved person, and that is where the Court has to exercise its discretion as to the issue of the writ." It has been rather assumed that the Lord Justice was there laying it down that those entitled to the writ as of right are first, persons who have been deprived of office, and secondly, aggrieved persons. In my opinion no such distinction was really intended, although the words seem to lend themselves to that construction. A person deprived of his office is entitled to the writ, because he is a person aggrieved; but there are other persons who may be aggrieved and as such entitled to the writ as of right. The matter is put quite plainly

(1) [1899] 2 Q. B. 455. (2) Ibid. 471.
(3) L. R. 5 Q. B. 466.

by Blackburn J. in *Reg.* v. *Surrey Justices* (1) and by A. L. Smith L.J. in *Reg.* v. *Nicholson.* (2) The passage in Vaughan Williams L.J.'s judgment in the latter case has been to some extent misunderstood and misapplied.

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SALTER J. I agree that the rule should be made absolute.

Rule absolute.

Solicitors for rule: *Charles Robinson & Co., for Charles Robinson, Hounslow.*

Solicitors showing cause: *Field, Roscoe & Co., for Percy Umney & Scorer, Richmond.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A. 1920 *July* 6.

SPRINGER *v.* GREAT WESTERN RAILWAY COMPANY.

[1919 S. 5.]

Carrier—Railway Company—Perishable Goods—Damaged Condition—Sale by Carrier—Agent of Necessity.

A quantity of tomatoes belonging to the plaintiff were delivered to the defendants at St. Helier, Jersey, for carriage to Covent Garden to be there delivered to the plaintiff. The tomatoes were put on board the steamship *Croham* (the rest of the cargo consisting also of tomatoes for a large number of different consignees) on September 20, but the *Croham* was detained at St. Helier by bad weather until the 23rd. She arrived at Weymouth at 12.45 P.M. on the 24th, and on the morning of that day a strike of the defendants' men broke out suddenly at Weymouth. There were two other vessels in the harbour to be unloaded first, so that the *Croham* could not be unloaded until the 26th. The defendants' traffic agent at Weymouth, being anxious about the cargo on account of the strike and the length of time the cargo had been on board, sent his head clerk on the arrival of the *Croham* on the 24th to examine it, and the clerk having removed the hatches and examined the top tiers found them to be in very bad condition. The *Croham* was unloaded on the morning of the 26th, and the traffic agent decided to sell the cargo as a whole locally, the strike preventing the tomatoes being forwarded by railway. He accordingly did so. The plaintiff's tomatoes were in fairly sound condition, and the plaintiff could have been communicated

(1) L. R. 5 Q. B. 466, 472. (2) [1899] 2 Q. B. 455, 470, 471.

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with before selling. The railway strike ended suddenly in the afternoon of the 26th after the sale had been effected. In an action by the plaintiff for damages for breach of the contract of carriage:—

Held, that, in the circumstances, the defendants' traffic agent with the knowledge he possessed on the 24th ought then to have communicated with the plaintiff so as to get his instructions as to what he wished to be done with his tomatoes, and the defendants were liable in damages for having sold the tomatoes without first communicating with the plaintiff.

APPEAL from the judgment of Salter J. at the trial of the action without a jury.

The action was brought to recover damages for breach of contract to carry and deliver a quantity of tomatoes from Jersey to Covent Garden, London.

On September 19, 1918, the plaintiff, through his agents at St. Helier, Jersey, agreed with the defendants for the carriage by them of 198 half sieves or baskets of tomatoes from Jersey to Covent Garden Market and there to deliver them to the plaintiff. Each sieve bore the plaintiff's name and address. No time was specified within which the tomatoes were to be delivered. By clause 2 of the conditions indorsed on the consignment note, "In respect to any . . . . goods booked through by them or their agents for conveyance partly by railway and partly by sea . . . . the company shall be exempted from liability for any loss, damage, or delay which may arise during the carriage of such . . . . goods by sea, from the Act of God, the King's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such conditions. . . . ."

The tomatoes were picked on September 19, and taken to the wharf at St. Helier, and on the following day they were put on board the steamship *Croham*, forming part of a cargo of 17,800 packages of tomatoes. The *Croham* was weatherbound at St. Helier from the 20th to the 23rd. She sailed on the evening of the 23rd and, being a slow vessel, did not arrive at Weymouth until 12.45 P.M. on Tuesday, the 24th. A strike of railwaymen on the defendants' system broke out

unexpectedly at Weymouth at 10.30 A.M. on September 24, and it involved a large area. There was no evidence that the strike was due to any fault of the defendants, or that it could have been foreseen or prevented by them. One result of the strike was, as the learned judge found, that no further despatch of goods by rail from Weymouth could be made for an indefinite time; another result was that the unloading of the goods in the harbour was greatly retarded; and a third result was that it became commercially impracticable to sort out the goods of the different owners of the cargo so as to deal separately with each consignment. There was only one berth for unloading, and there were two other vessels in the harbour to be unloaded when the *Croham* arrived. Consequently the cargo of the *Croham* could not be unloaded until Thursday, the 26th, and then could not be forwarded by rail unless the strike was at an end. This was the position when the *Croham* arrived. Mr. Boyle, the defendants' traffic agent at Weymouth, was anxious as to the condition of the cargo, and, as he said in his evidence, he expected trouble the moment the strike began on Tuesday morning, and from the cargo having been on board so long. Accordingly as soon as the *Croham* arrived on the 24th he sent his head clerk, Gill, on board to examine the cargo. The hatches were removed, and as Gill said in his evidence: "Condition. Top tiers very bad. Heated and overripe. Almost made me sick. . . . . The tomatoes were half cooked." The hatches were left off and wind sails were rigged. On Thursday, the 26th, the unloading began at 6 A.M. and was finished at 10 A.M. The tomatoes were unloaded on to the quay and stacked in three classes: Those fit to be forwarded; those which could be forwarded after the baskets had been repaired; and those unfit to be forwarded. The plaintiff's sieves were not packed on board together, but were mixed up with other half sieves, and so were put on the quay. About 10 A.M. on the 26th Mr. Boyle came to the quay, and after examining the tomatoes decided that in the circumstances it would be best to sell the cargo as a whole forthwith. He accordingly, without communicating with the consignees, on the morning of

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the 26th sold the whole cargo locally at a flat rate of 2*s.* per parcel over all. The number of consignors of packages of tomatoes on board the *Croham* was 130, and the number of consignees was 223; and Mr. Boyle in his evidence stated that it was impracticable to communicate with the 223 consignees, that he did not consider whether to notify each of the owners or consignees, the reason being that he could not tell him the condition of his lot, and that on the 26th it was impracticable to sell each lot separately. The strike ended at 2 P.M. on the 26th as suddenly as it had begun, but when the tomatoes were sold there was no evidence that this event could have been foreseen by Mr. Boyle, and the learned judge was satisfied that when he sold the cargo that morning he had good reason to assume that further transit by rail would be impossible. The learned judge came to the conclusion that Mr. Boyle was in possession of documents which would have enabled him to communicate directly and forthwith by telegraph or telephone with the Covent Garden consignees, including the plaintiff, and through St. Helier certainly and through Paddington probably he could have communicated promptly with most of the other consignees, probably with all; and he could have received their instructions by telegraph and telephone in the course of the 24th and 25th, and by the morning of the 26th he could have been in receipt of written instructions. It appeared that the plaintiff's consignment was in fairly good condition, and the learned judge found that the plaintiff, if informed, would have sent a motor lorry to bring his consignment to London.

1920. March 29. *Barrington-Ward K.C.* and *Wilfrid Lewis* for the defendants. It is the duty of a common carrier, in the absence of a special contract, to deliver goods entrusted to him for carriage in a reasonable time, having regard to the existing circumstances, and he is not responsible for delay arising from causes beyond his control: *Taylor* v. *Great Northern Ry. Co.* (1) The existence of a strike amongst the defendants' servants, not due to any fault on the part of the

(1) (1866) L. R. 1 C. P. 385.

defendants, affords an excuse for not delivering the plaintiff's goods in the ordinary course: *Sims* v. *Midland Ry. Co.* (1) The defendants not being able to forward the goods beyond Weymouth were bound to take all reasonable steps to preserve the goods in existence: *Great Northern Ry. Co.* v. *Swaffield* (2); but they are not liable for the deterioration of goods while in their custody by reason of inherent vice: *Lister* v. *Lancashire and Yorkshire Ry. Co.* (3) In the circumstances of this case the defendants were justified in selling the plaintiff's tomatoes without communicating with him. The goods were of a perishable character and were rapidly deteriorating. It was impossible to obtain instructions from all the consignees, and even if instructions could have been obtained, it would not have been possible in the time available to have done better than the defendants in fact did by selling all the tomatoes on the spot.

Colam K.C. and *F. O. Robinson* for the plaintiff. *Sims* v. *Midland Ry. Co.* (1) is a binding authority in this Court, and therefore it cannot be disputed that the defendants are not liable for any damage caused by the delay in delivery owing to the strike. But the sale of the plaintiff's tomatoes by the defendants without notice to the plaintiff was a tort for which damages are recoverable unless the defendants can justify the sale on the grounds that there was a necessity for the sale, and that it was impossible to communicate with the plaintiff and obtain his directions: *Australasian Steam Navigation Co.* v. *Morse.* (4) It is not sufficient for the defendants to prove that their officials thought that they were doing the best for all concerned, or even that the course adopted was in fact the best: *Atlantic Mutual Insurance Co.* v. *Huth.* (5) Even where goods are of a perishable nature and the owner is communicated with, the goods cannot be sold by the carrier if the owner refuses to consent to a sale: *Acatos* v. *Burns* per Brett L.J. (6) The plaintiff's tomatoes were in fact not in danger of immediately perishing, and if the plaintiff had been

(1) [1913] 1 K. B. 103.
(2) (1874) L. R. 9 Ex. 132.
(3) [1903] 1 K. B. 878.
(4) (1872) L. R. 4 P. C. 222, 228.
(5) (1880) 16 Ch. D. 474, 481.
(6) (1878) 3 Ex. D. 282, 290.

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communicated with he could have arranged for their immediate carriage to London. Even if there were a difficulty in communicating with all the other consignees, that is not a justification for selling the plaintiff's goods without communicating with him: *Australasian Steam Navigation Co.* v. *Morse.* (1)

SALTER J. [after stating the facts, and the conclusions at which he had arrived as above mentioned]. The position therefore when Gill examined the cargo on Tuesday, the 24th, and reported unfavourably was that the cargo was already in bad condition, that it could not be touched until Thursday, the 26th, and the further transport by rail was impossible for an indefinite time. In these circumstances it was, in my opinion, the duty of the defendants under the contract of carriage to endeavour to communicate with the owners of the cargo without delay. No attempt to do this was ever made. The sale of the plaintiff's goods is a breach of the contract to carry them to London, unless the defendants can satisfy me, first, that it was commercially impracticable to communicate with the plaintiff; and, secondly, that the sale of the plaintiff's goods was really necessary: *Sims* v. *Midland Ry. Co.* (2) Whether communication with the owner is commercially practicable or not must depend on the facts of each case, but I think it is safe to say that if communication is physically possible without disproportionate expense, and if there is reason to expect that instructions can be obtained before a final decision must be made, then the carrier must at least attempt to obtain such instructions before he deals with the goods otherwise than under the express terms of the contract of carriage. It was contended that if Mr. Boyle had communicated with the owners he would have received conflicting instructions, and that his difficulty would not have been removed and might have been increased. To my mind this is no answer. It is true that the defendants could not deal separately with each consignment, but in many cases the owners could. The plaintiff, if informed, would

(1) L. R. 4 P. C. 235. (2) [1913] 1 K. B. 103.

certainly have sent a lorry with men who would have picked out his goods when taken from the ship and brought them to London. There is no doubt many other owners would have taken a similar course. But apart from this, I cannot accept the contention that it is for the carrier to judge whether a useful purpose would be served by communicating with the owner. A bailee cannot claim to be an agent of necessity if his principal is commercially accessible and he makes no attempt to get instructions. For these reasons I think that the sale of the plaintiff's goods was a breach of the contract of carriage, and a wrongful conversion of the goods. As the plaintiff has not in fact received any part of the proceeds of the sale, he is entitled to obtain as damages the sum his goods would have realized if there had been no breach of contract. To ascertain this sum I must assume that the plaintiff would have received information on the 24th or 25th. He owns motor lorries, and he stated that he would have sent one to fetch these goods. I do not doubt that he would. Owing to the strike the London market was insufficiently supplied, and tomatoes were realizing good prices. I think that the goods would have reached Covent Garden at the latest in time for the early market on the 28th. To help me to determine what they would then have realized I have the following evidence. [The learned judge then referred to the evidence, and gave judgment for the plaintiff for 75*l.* 18*s.*]

The defendants appealed.

1920. July 6. *Barrington-Ward K.C.* and *Wilfrid Lewis* for the defendants. The law as laid down by Scrutton J. in *Sims* v. *Midland Ry. Co.* (1) is not questioned on this appeal. The duty of the defendants to communicate with the consignees, if it was commercially possible to do so, is not denied. In this case there were 223 consignees, and it was commercially impossible to communicate with them all. Until the tomatoes were unloaded on the 26th Mr. Boyle had no ground for acting, and on the evidence he did not and could

(1) [1913] 1 K. B. 103.

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not have acted until the morning of that day. These were perishable goods, and he then had to act at once, and it was too late to communicate with the consignees, even if it were possible to do so. He then did the best he could for all concerned by selling the tomatoes locally. The defendants are therefore not liable.

Colam K.C. and *F. O. Robinson* for the plaintiff were not called upon.

BANKES L.J. No complaint is made that the learned judge misconceived the law applicable to the case. The complaint is that the facts do not justify the learned judge's application of the law.

The plaintiff, who carries on business in Covent Garden, was the consignee and owner of a large quantity of tomatoes packed in baskets bearing his name and address, to be carried by the defendants from Jersey to Covent Garden. The tomatoes, which formed part of a cargo of tomatoes for numerous consignees, were carried from St. Helier, Jersey, to Weymouth in a steamer called the *Croham*. After the tomatoes were shipped the *Croham* was detained at St. Helier by bad weather for three days. She left St. Helier on September 23 and made a slow passage, arriving at Weymouth at 12.45 P.M. on the 24th. A strike of railwaymen on the defendants' system had broken out that morning, and as there were two other vessels waiting to be discharged it was not possible to begin the discharge of the *Croham* until Thursday, the 26th, when a considerable quantity of the tomatoes on board the *Croham* were in an unmerchantable condition. The defendants, without communicating with any of the consignees, sold the whole cargo locally.

The plaintiff's case is this: You, the defendants, ought to have communicated with me, the plaintiff, at the earliest possible moment when you realized that it would probably be impossible to complete the carriage of my goods by delivering them at Covent Garden, and thus given me the opportunity of deciding for myself either to bring them by motor to London or to sell them locally; and not having

done so, you have committed a breach of your duty as carriers, and are responsible to me in damages. It is admitted that the law is correctly laid down in the judgment of Scrutton J. in *Sims* v. *Midland Ry. Co.* (1), where the learned judge cites with approval a passage in s. 297 of Carver on Carriage by Sea, that "the conditions necessary in order to make such a sale valid are—(1.) that a real necessity must exist for the sale, and (2.) that it must be practically impossible to get the owner's instruction in time as to what shall be done." The whole cargo was, as I have said, sold by the defendants on the 26th as one indivisible lot, and the question is whether they were entitled to do so. That depends in the first place upon whether it was practically impossible in the circumstances to get the owner's instructions on or before the 26th as to what should be done. With regard to that we have to consider what opportunity the defendants' representatives had of forming a judgment as to the condition of these tomatoes upon the arrival of the vessel, or soon after, and as to whether it was at all likely that it would be possible to send the tomatoes on in a merchantable condition, or whether it was not obvious that in the circumstances prevailing a sale would have to take place. The position was this: On the arrival of the *Croham* on the 24th Mr. Boyle, the defendants' traffic agent who was in charge at Weymouth, sent his head clerk, Gill, on board, and Gill stated in his evidence, as appearing on the judge's notes, what the condition of the tomatoes was. He said: "Top tiers very bad. Heated and overripe. Almost made me sick. . . . . The tomatoes were half cooked." He must have reported that to Mr. Boyle, whose condition of mind before he received the report was thus expressed by him in his evidence: "I expected trouble the moment the strike began, Tuesday morning, and from the cargo having been on board so long." In these circumstances one asks oneself what conclusion must this experienced gentleman have arrived at on the 24th? He was faced with this condition of things: A vessel arrived long overdue with a cargo of tomatoes—a

(1) [1913] 1 K. B. 112.

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perishable cargo—largely in bad condition. A strike had just broken out the length of which no one could foretell. It had apparently begun in South Wales and had spread to Weymouth, but no one at that time could foretell whether it was going to last a day or a week or a month. There were two vessels which had to be discharged at the berth before the discharge of the *Croham* could begin. I cannot conceive it possible that Mr. Boyle could have arrived at any other conclusion than that the tomatoes could not be further carried by rail, and that a sale was inevitable if the tomatoes remained at Weymouth and were to be disposed of in anything like a merchantable condition. If that is so, it seems to me that it was his duty to communicate immediately with the consignee. He did not do so, and Salter J. has held the defendants liable in damages. With that conclusion I entirely agree.

It seems to me from the evidence of Mr. Boyle that he has misconceived the purpose of communicating with the consignee. The object is to enable the consignee to give the carrier instructions as to whether the latter shall sell if he considers it necessary. Mr. Boyle said in his evidence: "I did not consider whether to notify the owner or consignee, the reason being I could not tell him the condition of his lot." It is true that he could not tell the consignee the condition of his lot, but he could tell the consignee that he had formed the conclusion that it would in all human probability be necessary to sell the tomatoes locally if they were to be saved, and ask him whether he wished the defendants to sell them for him, or whether he wished to deal with his lot himself. A communication of that kind would have met the situation and relieved the defendants from liability.

I agree therefore with the decision of the learned judge; and it now turns out from a telephonic communication which Scrutton L.J. has discovered and which was apparently not brought to the learned judge's attention, that this was the view Mr. Boyle himself entertained and communicated to his superior at Paddington.

The appeal fails and must be dismissed.

WARRINGTON L.J. I agree.

SCRUTTON L.J. The defendants have sold somebody else's goods, and they have no right to do so unless they establish certain conditions. They are agents to carry, not to sell. To give them the right to sell, circumstances must exist which put them in the position of agents of necessity for the owners to take that action which is necessary in the interests of the owners. Those conditions do not arise if the carrier can communicate with the owners and get their instructions. If the railway company can ask the owner what is to be done in the circumstances with any reasonable chance of getting an answer, they have no right to sell. They must give the owner the opportunity of deciding how he will deal with his own goods. He probably knows much better than the railway company what is the best course to take. The company cannot be experienced in dealing with every class of property which they carry, whereas the trader knows the best way of disposing of the particular kind of goods in which he deals. Therefore to justify a sale by the railway company they must first show that it was commercially impossible to communicate with the owner and receive instructions from him. If they show that, they must then show that a sale was in the circumstances the only reasonable business course to take.

In this case, on September 24, when the tomatoes arrived at Weymouth in a ship three days late, with a railway strike just begun, it was fairly obvious that there was a serious risk of the tomatoes not getting to London in a condition which would justify sending them on. In those circumstances it was, in my view, the duty of the railway company to ask the consignee for instructions. They were not entitled to take upon themselves the duty of settling what should be done with the goods if there was any reasonable commercial possibility of obtaining instructions from the owner. That there was such a probability of loss on the 24th as I have mentioned is, I think, made clear from the telephonic communication of the 24th. It shows that on that day it had been determined

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to sell the tomatoes locally, pointing to the fact that it was then thought extremely probable that the duration of the strike, combined with the damage arising from the prolonged voyage, might render it desirable to dispose of the tomatoes in some way other than by carrying them to their destination. Was it commercially impossible to communicate on September 24 with the consignee at Covent Garden? The question answers itself. Obviously it was not. The reason Mr. Boyle gave in his evidence for not communicating was that he could not tell the consignee the condition of his lot. That, to my mind, in the circumstances was not a sufficient reason justifying his not communicating. He should have communicated with the consignee, stating the probable delay and anything he knew about the condition of the goods, and asking for instructions. The consignee would then have had the opportunity of deciding whether to leave it to the man on the spot who knew the local conditions, or to send a motor lorry to bring the goods to London. In fact it appears that this particular lot was in fairly sound condition, and Mr. Boyle seems to have been under the erroneous impression that, when the tomatoes had been discharged on to the quay, he could sell the goods which were in good condition because it was to the interest of the goods which were in bad condition—that is to say, to apply a sort of law of general average and sacrifice the good for the benefit of the bad. If there is an all over price it is naturally very good for the owners of the goods in bad condition and very bad for the owners of the goods in good condition. That view of Mr. Boyle seems to me to be an entirely erroneous view.

I hope I correctly stated the law in *Sims* v. *Midland Ry. Co.* (1), which seems to me, reading it now, to be accurate. It is not disputed in the present case. The question in dispute is its application. On the facts here there was time to communicate with the plaintiff and it was commercially possible to do so and to ask him what he wished should be done with the tomatoes. That being so, the defendants were

(1) [1913] 1 K. B. 103.

bound to communicate with him, and were not entitled to take upon themselves the burden of deciding the question which the plaintiff, the consignee, was the person to decide.

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For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff : *C. J. Parker.*
Solicitor for defendants : *A. G. Hubbard.*

W. F. B.

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1920 *Oct.* 26, 27.

Tramway—Purchase of Undertaking by Local Authority—Items constituting Value—Engineer's Remuneration—Interest on Capital during Construction—Cost of raising Capital—Preliminary Expenses—Cost of Obligation imposed by Order authorizing Tramway—Depreciation—Tramways Act, 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43.

Local authorities under the powers conferred on them by s. 43 of the Tramways Act, 1870, gave notice to the claimants to sell to them their tramway, then some fourteen years old. In determining the "then value" of the tramway within the meaning of the section and in the manner prescribed in *Edinburgh Street Tramways Co.* v. *Edinburgh (Lord Provost)* [1894] A. C. 456 :—

Held, that there must be allowed as part of the value (1.) the remuneration of the engineer, but subject to depreciation, because, although if a new tramway had been built a new engineer would have been employed, the purchase of the tramway had postponed that necessity; and (2.) interest on capital during construction as part of or an accretion to the capital employed, and subject or not to depreciation according to whether spent on depreciating things, such as rails, or on a non-depreciating thing, such as excavation. But *held*, that there must be disallowed (3.) the cost to the promoters (whose rights and obligations had been transferred to the claimants) of raising their capital.

The arbitrator included also a sum, based on his experience in such matters, for preliminary expenses—directors' fees, expenses of the formation of the company, etc.—without giving details.

Held, that the Court would not interfere with his decision.

In the Order authorizing the construction of the tramway a provision was inserted at the instance of a railway company over whose lines

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the tramway passed by a bridge, that if the railway company required at any time to make structural alterations to the bridge, the promoters should temporarily divert the tramway. Some years afterwards the railway company did so require, and the tramway was diverted.

Held, that the cost of diversion could not be allowed either as part of the cost of construction or otherwise.

AWARD stated in the form of a special case.

In 1896 the British Electric Traction (Pioneer) Co., Ld. (called herein "the promoters"), obtained an order, the Oldham, Ashton, Hyde and District Electric Tramways Order, 1896, under which certain tramways were constructed, and the Oldham, Ashton and Hyde Electric Tramway, Ld. (herein called "the claimants"), had become at the date of notice hereinafter mentioned the owners of these tramways with the benefit of the rights and subject to the obligations created by the said order.

In 1918 on a date agreed as May 1, 1918 (called herein "the date of notice"), the corporations of Ashton-under-Lyne and Hyde and the Audenshaw and Denton Urban District Councils (called herein "the purchasing authorities"), under the powers conferred by s. 43 of the Tramways Act, 1870 (1), gave notice in writing (called herein "the said notice") to the claimants that they required them to sell to them such parts of the tramways as were within the respective districts of the purchasing authorities (called herein "the tramway"). Differences arose between the parties within the meaning of s. 43, and were referred to arbitration, and the arbitrator,

(1) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43: "Where the promoters of a tramway in any district are not the local authority, the local authority . . . . may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party. . . . ."

Sir Maurice Fitzmaurice, stated his award in the form of a special case.

The arbitrator awarded 142,174*l.* as the "then value," at the date of notice, of the "purchased undertaking," exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever "except the consideration of the value of the purchased undertaking measured by what it would cost to construct and establish the purchased undertaking" on the date of notice "if the purchased undertaking had not existed at that date, but taking into account a proper deduction in respect of depreciation as hereinafter mentioned."

The above sum was made up as follows :—

	£	s.	d.
(A) Value of permanent way, overhead electric equipment, cables and cars, less an agreed deduction of 3600*l.* ..	110,396	0	0
(B) Value of lands, buildings, office furniture and fittings, car shed track, car shed equipment, etc.	10,717	0	0
(C) Value of plant, tools and fittings and car shed and plant and fittings belonging to the Tramway Co. Ashton Power Station	2906	0	0
(D) Amount allowed for Parliamentary expenses	3000	0	0
(E) Amount allowed for preliminary expenses	1500	0	0
(F) Amount allowed for miscellaneous items	2395	0	0
(G) Amount allowed for cost of raising capital	5500	0	0
(H) Amount allowed for interest on capital during construction	5760	0	0
	£142,174	0	0

There was no dispute in the case as to items (B), (C) or (D).

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The questions for the arbitrator were: (1.) Whether an item for "engineering" included in (A) should be subject to depreciation. (2.) Whether certain expenses in the formation of the promoting company, and certain preliminary expenses, directors' fees and managerial expenses in (E) and (F) should be allowed, and, if allowed, should be subject to depreciation. (3.) Whether (G) and (H) should be allowed, and if so whether subject to depreciation.

The arbitrator was of opinion: (*a*) that he ought to depreciate the engineering item on the ground that it should be treated in the same way as other items of cost of construction in respect of the structure of the purchased undertaking which did not represent expenditure made once for the whole life of the undertaking. (*b*) That the claimants were not entitled to a specific sum claimed under (E) and (F) on the ground that he ought to disregard specific items of expenditure under these heads and merely include in his valuation such sums as he considered "would be properly and reasonably spent on preliminary expenses by any one undertaking" the construction and establishment of the tramway. (*c*) That the claimants were entitled to (D) as part of the cost of construction and establishment. (*d*) That claimants were entitled to (G). (*e*) That the claimants were entitled to (H), as part of the necessary cost of construction. (*f*) That a certain sum, part of (A) expended on Guide Bridge, should be allowed as being incurred in pursuance of obligations created by the said order. (1) In consequence of certain structural alterations of the bridge made some eight years after the construction of the tramway the claimants had for a time to divert the tramway over a temporary bridge under

(1) Oldham, Ashton, Hyde and District Electric Tramway Order, 1896: "Whenever and so often as the [railway company whose lines the tramway crossed by Guide Bridge] shall require to [make any specified structural alterations to the bridge] and they shall find it necessary for effecting any of such purposes that the working and user of any of the said tramways over such bridge . . . . shall be wholly or partly stopped or delayed or that such tramways shall be temporarily diverted . . . . [this shall be done] accordingly at the expense of the promoters and under the superintendence of their engineer."

the provisions of the order. The arbitrator further held with regard to all the items allowed that they were not subject to depreciation on the ground that they represented expenditure made once for the whole life of the "purchased undertaking," and ought to be treated on the same basis as, e.g., Parliamentary expenses and the cost of excavating. In the event of the Court holding that he was wrong as to any of the above items, he made alternative awards as to each. He awarded the above, and in addition the value of certain stores, spare parts and loose tools, the whole representing the "then value" of the "purchased undertaking" within the meaning of s. 43 of the Tramways Act, 1870.

Vesey Knox K.C. and *T. Eastham* for the purchasing authorities. Under s. 43 of the Tramways Act, 1870, the claimants are entitled to be paid for everything that cost them money provided they are in a position to transfer it to the purchasing authorities: *Edinburgh Street Tramways Co.* v. *Edinburgh* (*Lord Provost*) per the Lord Ordinary. (1) This is not like a sale under the Lands Clauses Act where the measure is the value to the vendor, but the "then value" in fact of what the vendors can transfer. The arbitrator uses an unfortunate expression when he speaks of the "purchased undertaking," for it is the structure only that is transferred, not the undertaking: per Lord Herschell in the above case on appeal. (2) This does not mean the scrap value, but means the structure capable of being worked as a tramway. The purchasing authorities have to pay what they save by purchasing the tramway instead of constructing it themselves: and see per Lindley L.J. in *In re London County Council and London Street Tramways Co.* (3) The "then value"—i.e., at the date of notice—is ascertained by finding what it would cost to construct and establish the tramway at that date, and then to depreciate that figure down to a figure which represents its real value at that

(1) (1894) 21 R. 688, 693*n*. (2) [1894] A. C. 456, 464.
(3) [1894] 2 Q. B 189, 206.

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date. Every item which is not permanent—that is, worth as much after the lapse of years as at the beginning—should be depreciated.

The cost of the engineering—that is, the cost of the engineer on a percentage basis—is admitted. But it is subject to depreciation, for on building a new tramway a new engineer would have to be employed, and the purchase of the tramway postpones that necessity.

The preliminary expenses—i.e., those of the tramway before it begins to earn, such as directors' fees, cost of formation of the company, managerial expenses, etc.—may be part of the cost of establishing the company, but not of constructing the tramway, and should not be allowed, though this contention is not pressed. But if allowed it must be as part of the cost of construction, and so, being attached to a wasting asset, also subject to depreciation.

The cost of raising capital was never allowed formerly, but since the case of *National Telephone Co.* v. *Postmaster-General* (1) is sometimes allowed. But it is no part of the cost of establishing the tramway as a structure: see the dissenting judgment of Sir James Woodhouse. The manner and cost of raising money with which to construct the tramway is an irrelevant topic, for otherwise the amount of this item would depend on the financial standing of the particular promoters. It represents no asset transferred to the purchasing authorities, who would have to raise their own capital with which to purchase. And on every subsequent transfer of the tramway this item would appear and would be added to the similar items preceding it. But if allowable it would be as part of the cost of construction and, as already contended, depreciable.

Objection to interest on capital during construction, usually claimed since the *Telephone Case* (1), is not pressed. But as part of it represents capital spent on wasting assets —e.g., rails—it should be subject to depreciation to that extent.

(1) (1913) 29 Times L. R. 190.

With regard to Guide Bridge, the arbitrator was wrong, first in allowing this item at all, and, if right in allowing it, in refusing to depreciate it. This was a revenue expense, and might be incurred more than once. The obligation to divert made the tramway worth less, and is really a clog on the property. In theory the tramway is being constructed on the date of the said notice, and the diversion could not take place at the same time, and the purchasing authorities are purchasing the tramway which is there. If allowed it must be as part of the cost of construction, and should be subject to depreciation.

[*Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board* (1) and *In re Manchester Carriage and Tramways Co. and Ashton-under-Lyne Corporation* (2) were also referred to.]

Clode K.C., *Hon. E. E. Charteris K.C.* and *A. Tylor* for the claimants. It is contended that no point of law is raised in this case, and all the questions were decided by the arbitrator as questions of fact.

The item for engineering is a once-for-all expense and therefore not subject to depreciation, but the arbitrator has decided otherwise, and although the claimants do not agree with that decision they are bound by it as his finding is one of fact.

In dealing with the preliminary expenses the arbitrator has not given the details but, having great experience in these matters, says: "I give what is a reasonable sum which anybody establishing a tramway must incur." And he has not depreciated it. There is no rule of law which makes it impossible for him to arrive at his decision in this manner; he has exercised his judgment to the best of his ability, and that cannot be interfered with. This also is a once-for-all expense.

The cost of raising capital is a necessary expense; a hypothetical promoter of good credit is assumed, and this cost then becomes a question of fact with which the arbitrator has dealt. Both this and interest on capital

(1) [1893] A. C. 444. (2) (1904) 68 J. P. 576.

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during construction are once-for-all expenses and therefore not depreciable.

With reference to Guide Bridge, when an order of this kind is made it is customary to insert therein various provisions, on the demand of different persons for their protection, and this provision as to diversion is one of that class. In course of time such provisions may materialise and become a burden, as did this provision. That is part of the cost of establishment. It makes no difference that this expense was incurred after the construction of the tramway, for the obligation was imposed at the time when the order was obtained.

Vesey Knox K.C. replied.

ROWLATT J. This case raises questions as to the proper method of arriving at the purchase money to be paid for a tramway purchased by local authorities under s. 43 of the Tramways Act, 1870. That section says that what is to be paid is the "then value" of the tramway and all lands, buildings, works, materials and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, but excluding any allowance for past or future profits of the undertaking. That is, excluding any compensation for compulsory sale. When one comes to examine carefully the process which the section describes one is met with very great difficulty in understanding it, because when one is discussing the value of a commercial undertaking the element of value is its profits and there is none other. To seek to find a value without looking at the profits is like seeking to build a house without materials. If one disregards profits the value seems to be the scrap value, but that is not what was meant. The only way in which to deal with the matter, a way which is well established, is to take an estimate of the cost of constructing the tramway at the time when the "then value" is to be ascertained, subject to depreciation in order to get at the actual value at that time. One treats it, not as a scrapped undertaking but as a structure to be used as a tramway, or in other words,

as a thing worth having, and assumes that the money has not been wasted and would not be wasted if the tramway was built again. That is the only way in which it can be worked. Criticisms upon it readily occur to one, but it is established.

Several questions are raised in the case. The first is as to the allowance for engineering—the engineer's remuneration. The arbitrator has allowed it, and, it is not disputed, rightly so, for one can no more build a railway without paying the engineer than without paying the workmen. The arbitrator has depreciated it, but I will deal with the other items claimed before dealing with the question of depreciation.

The second question is as to the preliminary expenses. Mr. Vesey Knox for the respondents does not press his objection to their inclusion, as I think, wisely and properly. The arbitrator has not taken the actual expenses of formation, directors' fees and other managerial expenses. He says that there must be preliminary expenses, and has taken a round sum which he considers reasonable, and I think he was justified in so doing.

I now come to another question, touched upon in the *Telephone Case* (1)—namely, that of the cost of raising capital. The arbitrator has allowed it as part of the necessary cost of construction and establishment of the undertaking. Divergent views were expressed in the *Telephone Case* (1), and the view I take is that of the dissenting judge, if I may call him so, Sir James Woodhouse. It seems to me that this item cannot be allowed, and I think it clearly raises a question of law. The cost of raising capital is antecedent to the relevant history of the case. It does not seem to me to matter whether the promoters get money in the money market, or whether it was given to them, left to them or stolen by them. There is the money; how much of it do they spend in making the tramway? That is where the inquiry begins. For that short reason I think that the cost of raising capital cannot be allowed.

(1) 29 Times L. R. 190.

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The next item is the interest on capital during construction, which the arbitrator has allowed. Counsel for the respondents concedes that this is right. It differs toto cœlo from the cost of raising capital, because it really is part of the actual cost. If one spends 100*l.* on buying something in 1919 which brings in nothing until 1920, one spends on that not only the capital laid down, but also the value of that capital lying idle for a year, and that is part of the cost.

The last item is a very curious one—namely, the expenses in connection with Guide Bridge. When this order was under discussion the promoters were put upon terms to pay for the temporary diversion of their tramway if it became necessary to strengthen the railway bridge over which it ran. It did become necessary, and they made a temporary bridge alongside the railway bridge, and for some time ran their tramway across it. It is said that the cost of this diversion was part of the cost either of making the tramway or of obtaining the order—the cost of making the tramway in its widest sense. I cannot agree. It depends upon how the problem is dealt with. I quite understand that if the promoters had been compelled to make a tramway with some expensive appliance which was divertible ab initio, they would have had to pay for that expensive thing. For instance, suppose they had had to build another bridge to use alternatively, that would have been part of the expense of building the tramway. They would have that convenience and would have to pay for building it. But that is not what took place. They were told that if this diversion became necessary they must make it. The expense of doing that seems to me not the expense of constructing a thing but a burden put upon the thing when constructed. The promoters got something less for their money—namely, something subject to this burden. It did not cost them to construct this tramway what they subsequently had to pay on diverting it. This is a pure question of law, and I think the arbitrator was wrong upon this point.

I will now deal with the question of depreciation, and

first with regard to the engineering expenses. The arbitrator has depreciated the allowance for engineering—that is to say, he has treated the engineering expenses as expenses like the wages of the workmen paid for building the tramway which is getting older and has depreciated. If a new tramway were built a new engineer would have to be paid, but the purchase of the tramway postpones that necessity. Mr. Clode for the claimants says he cannot quarrel with that, because he says it is a question of fact.

Then the arbitrator comes to the preliminary expenses which he has not depreciated. Mr. Vesey Knox for the respondents objects to this, but I do not think I can disturb the decision, but ought to look at it broadly. The arbitrator has not given the items. If he had said that he had allowed so much for this preliminary expense, and so much for that, and had then added up the sum, one could dissect it, and say: "That preliminary expense is a once-for-all expense, while the other is really an increment to the cost of something which is perishable." But he has not done that; he has taken a round figure to represent what must be done by anybody in starting such a tramway, and he has not depreciated it. I cannot say he is wrong. I do not say he has concealed from me the means to enable me to say whether he is right or wrong. It seems to me that he has taken a right and supportable view in reaching that round figure, and reaching it as a non-depreciable thing, and I cannot question his decision.

No question arises on the cost of raising capital, as I have disallowed it.

The next question arises on the allowance of interest on capital during construction. With regard to this I do not take a clear view in favour of either side. I think it depends upon the facts. What I have already said about interest on capital shows how I regard it. I do not regard it as a separate thing which one can pick out and in respect of it allow a figure for interest on capital as such. I think the interest on capital is linked up with and forms an accretion to the capital itself. One spends the interest one has to forego

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just as much as one spends the capital sum. Therefore this item is depreciable or not depreciable with the capital on which it is the interest. I conceive that much of the capital was sunk in non-depreciable things like excavation and acquisition of powers, for I suppose the expense of attaining the powers was expense provided out of the capital. On the other hand much of the capital was spent in making the tram lines, which is a depreciable sum. Therefore it seems to me that this sum of interest on capital must be analysed and divided, and that the award must go back to the arbitrator for that purpose if the parties cannot agree on a sum.

Upon the whole, as both parties have achieved success to a certain extent, there will be no costs on the argument.

Award accordingly.

Solicitors for the purchasing authorities: *F. W. Bromley, Town Clerk, Ashton-under-Lyne; Thomas Brownson, Town Clerk, Hyde; William Richards, Clerk to Denton Urban District Council; Frederick Hamer, Clerk to Audenshaw Urban District Council.*

Solicitor for the claimants: *Sydney Morse.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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In re AN ARBITRATION BETWEEN TODD, COMPLAINANT, AND THE NORTH RIDING OF YORKSHIRE AGRICULTURAL EXECUTIVE COMMITTEE, RESPONDENTS.

Corn Production Act, 1917 (7 & 8 *Geo.* 5, *c.* 46), *s.* 9, *sub-s.* 9—*Ploughing Order—Conversion into Tillage—Tenancy created after service of Order on Owner in Occupation—Ploughing carried out by Tenant—Right of Tenant to Compensation—Separate Orders for separate Fields—Setting off Profit against Loss—Profit and Loss in subsequent Years—Defence of the Realm Regulations, Reg.* 2 *M.*

A notice to convert certain land into tillage, made under s. 9, sub-s. 1, of the Corn Production Act, 1917, and Regulation 2 M of the Defence of the Realm Regulations, was served on the owner of the land who was in occupation. After the service of the notice the owner agreed to let the land to a tenant who entered into occupation and carried out the requirements of the notice. The notice had not been served on the tenant. The tenant claimed compensation for loss alleged to have been suffered by him by reason of his having carried out the requirements of the notice, and the claim was referred to arbitration under the Act, and the arbitrator stated a case in which he asked the Court certain questions :—

Held, that the tenant was a "person who was interested in the land in respect of which the notice was served," within the meaning of s. 9, sub-s. 9, of the Corn Production Act, 1917, inasmuch as he was interested at the time when the loss was alleged to have occurred ; and (by Bankes and Atkin L.JJ., Scrutton L.J. not expressing a final opinion) that the tenant came within the words of the sub-section—"who suffers any loss by reason of the exercise of the powers conferred by this section" —and was entitled to compensation for the loss, if any, though the notice had not been served on him, as he had carried out the requirements of the notice.

Two notices were served, each in respect of a different field in a separate farm occupied by the same tenant :—

Held that, in the circumstances, the loss (if any) in respect of each field should be assessed separately.

The tenant of certain land in respect of which a notice to plough had been served under the Act sent in a claim for compensation on September 28, 1918, for the year 1918, and in 1919 he sent in a claim for compensation for 1919. The arbitration to assess compensation was held after both claims had been sent in :—

Held, that the assessment should not be based on the loss, if any, in each year separately.

By Bankes L.J. : The arbitrator should take the experience of the

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two years, setting off any profit in one year against any loss in the other.

By Scrutton and Atkin L.JJ.: The whole effect of the exercise of the powers conferred by the section had to be considered by the arbitrator, including an estimate of the probable loss or profit in the future.

APPEAL from the decision of the judge of the County Court of Yorkshire holden at New Malton, on a special case stated by an arbitrator under s. 13 of the Agricultural Holdings Act, 1908, and s. 11 of the Corn Production Act, 1917.

"1. The question referred to arbitration is a claim made by the complainant against the respondents for losses alleged to have been suffered by reason of the exercise by the Board of Agriculture and Fisheries of the powers conferred on them by regulation 2 M of the Defence of the Realm Regulations and continued in operation by the Corn Production (Amendment) Act, 1918.

"2. The claim relates to the ploughing out of certain fields under two orders made by the respondents and dated respectively January 8, 1918, and February 23, 1918. The former order relates (so far as this arbitration is concerned) to fields numbered 12 (part) and 45 on the ordnance map, and the latter relates (so far as this arbitration is concerned) to fields numbered 67 and 29 (part) on the ordnance map."

Each of the orders was headed "Cultivation of Lands Order, 1917," and each was as follows: "Under the above Order the North Riding of Yorkshire War Agricultural Executive Committee hereby give you notice to plough up and convert into tillage, the land described below and to properly cultivate the said land and produce thereon, in 1918, either a crop of corn or a crop of potatoes. The work is to be done to the satisfaction of this Committee, and should you fail to carry out the above instructions, I am to inform you that you will be guilty of an offence against the Defence of the Realm Regulations and will be liable to be proceeded against accordingly." The orders were signed by the secretary, and addressed to the Countess of Carlisle.

"3. The Order dated January 8, 1918, was served on the Countess of Carlisle, who was at that date the owner and in

occupation of the fields mentioned in that order as part of the Castle Howard Home Farm.

"4. The order dated February 23, 1918, was also served on the Countess of Carlisle, who was the owner of the fields mentioned in that order, and was also in occupation of those fields at that date as part of the Low Gaterley Farm. (1)

"5. The two fields mentioned in the first order were let to the complainant on February 27, 1918, and he entered into occupation of them on April 6, 1918. Before February 27, 1918, the complainant was not a person interested in the said fields.

"6. The Low Gaterley Farm comprising the two fields mentioned in the second order had been let to the complainant on October 11, 1917, and he entered into occupation of that farm on April 6, 1918. Before October 11, 1917, the complainant was not a person interested in the said fields.

"7. The ploughing out was carried out in part by the complainant and in part by the Countess of Carlisle, but the cost thereof has been paid by the complainant on entry.

"8. On September 28, 1918, the complainant gave to the Committee particulars of loss in respect of fields numbered 29 and 12. On July 28, 1919, he gave to the Committee particulars of loss in respect of fields numbered 67, 45 and 12. (2)

"9. The arbitration was commenced at York on December 30, 1919 (3), when Mr. Christopher Middleton appeared for the complainant, and Mr. Norman T. Crombie appeared for the respondents and the Ministry of Agriculture and Fisheries on whose behalf the respondents act in this matter.

"10. Mr. Crombie at once raised an objection to the claim as to field number 12 being considered the nature of which

(1) This farm was described in the order as the "Castle Howard Home Farm," but was, in fact, the "Low Gaterley Farm," a farm separate and distinct from the Home Farm.

(2) By a regulation made by the Board of Agriculture on July 28. 1919, a claim for loss suffered by reason of the exercise of the powers had to be made not later than one year after the date of the exercise of the powers, or where that period has expired, not later than July 31, 1919.

(3) The arbitrator was appointed on Dec. 1, 1919.

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objection appears in paragraph A. below. He also raised further questions which appear in paragraphs B., C., and D. below, and both parties to the arbitration, considering that these were questions of law, requested me to state a special case for the decision of the county court judge.

"The questions of law submitted for the opinion of the Court are :—

"A. As to fields numbered 12 and 45.

"The order relating to these fields was made on January 8, 1918, and was served upon Lady Carlisle, the owner and occupier of the field in question. The fields were let to John Todd (the complainant) on February 27, 1918. No further order was served upon him. The respondents contend that the complainant took the fields as arable or with a liability under his contract of tenancy to convert them into arable.

"The question of law which it is desired that the county court judge shall decide is whether the complainant who took these fields and first became interested therein after such an order had been served on his predecessor is entitled by reason of the ploughing out of such land to claim compensation for loss by reason of such ploughing out, although no order had been served upon him so that he could not have been prosecuted for non-compliance.

"B. As to fields numbered 29 and 67.

"These two fields had been ordered to be ploughed out in one order. The complainant as a person interested in these fields claims compensation for loss incurred in respect of the ploughing out of one of them, viz., No. 29, making no claim in respect of the other.

"The question of law which it is desired that the county court judge shall decide is whether, in the event of its being proved that the complainant made a profit on number 67 and a loss upon number 29, both being included in the same order to plough, is entitled to recover compensation in respect of the particular field on which a loss has been made, or whether the arbitrator should not take into account the whole effect of the order, so that the profit on the one field may be set off against the loss on the other.

"C. As to all the fields.

"As stated in this case, the claim referred to arbitration relates to fields comprised in two separate orders, which fields were in the occupation of the same person.

"The question which it is desired that the county court judge shall decide is whether, if it be determined that the complainant would be entitled to compensation for the loss (if any) suffered by reason of the ploughing required by each of such orders, the arbitrator ought to combine all the fields comprised in both orders so as to ascertain the actual loss (if any) which the complainant has incurred by reason of the ploughing of the whole of the fields comprised in the two orders, or whether he ought to ascertain separately the actual loss (if any) which the complainant has incurred by reason of the ploughing of the lands in the several orders.

"D. It is alleged that in respect of one field to which an order above referred to relates a loss was suffered by the complainant in 1918 and a profit in 1919. In respect of another such field it is alleged that the complainant made a profit in 1918 and a loss in 1919. In the former case the complainant claims for the loss suffered in 1918, and in the latter case for the loss suffered in 1919.

"The question of law which it is desired that the county court judge shall decide is whether the arbitrator should in dealing with such claim take into account any profit made in 1919 in assessing the compensation for loss made in 1918, and in the latter case whether he should take into account any profit made in 1918 in assessing the compensation for loss in 1919."

The county court judge gave the following opinion :—

"A. The complainant being a person interested in this land at the time when the claim for compensation arose is entitled by reason of the ploughing out of the land after an order had been served upon his predecessor to claim compensation for loss, although no order to plough had been served upon him personally.

"B. The arbitrator should take into account the whole effect of the order to plough upon all the land comprised

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therein so that the profit on any one field may be set off against the loss on any other (subject nevertheless to the proviso at the foot of this opinion).

"C. The arbitrator ought to ascertain and award separately the actual loss (if any) which the complainant has incurred by reason of the ploughing out of the lands comprised in each order, and ought not for this purpose to combine all the lands comprised in both orders.

"D. The arbitrator should, in dealing with the claims referred to, not take into account any profit made in 1919 in assessing the compensation for loss suffered in 1918, but should take into account any profit made in 1918 in assessing the compensation for loss incurred in 1919 (subject nevertheless to the proviso at the foot of this opinion).

"Provided always that, in ascertaining the amount of profit (if any) to be taken into account or set off against the loss (if any) under either of the above answers B. and D., the arbitrator should take into account and set off only any increase of profit arising from any land as ploughed over and above a reasonable estimate of the profit which would have arisen in the year or respective years under consideration from the same lands if no such orders had been made, and the land had remained in grass."

The respondents appealed to the Court of Appeal from the county court judge's decision on paras. A., C. and D. There was no appeal in respect of para. B.

Konstam K.C. and *G. G. Alexander* for the respondents. As to A., the complainant is not entitled to compensation under s. 9, sub-s. 9, of the Corn Production Act, 1917, in respect of the Home farm. (1) It is admitted that he is

(1) By s. 9, sub-s. 1, of the Corn Production Act, 1917, the Board of Agriculture and Fisheries may, for the purpose of increasing the production of food, serve notice on the occupier of land requiring him to cultivate the land in accordance with the directions of the Board.

By sub-s. 9: "Any person who is interested in any land in respect of which any notice is served or order made under this section . . . . and who suffers any loss by reason of the exercise of the powers conferred by this section shall, if he makes a claim for the purpose before the expiration of such period, not being less than one year, after the exercise of the powers as may be prescribed by the Board, be

entitled to compensation in respect of the Low Gaterley farm, as under the agreement of October 11, 1917, he became tenant of that farm before the service of the ploughing order, and the order may be treated as having been served upon him. Sect. 1 of the Corn Production Act, 1918 (8 & 9 Geo. 5, c. 36), is now substituted for sub-s. 3 of s. 11 of the Act of 1917, and the powers under the Defence of the Realm Regulations exerciseable by the Board of Agriculture are extended in point of time. See regulation 2 M (1.) (*c*) and (3.) of the Defence of the Realm Regulations. Sect. 9, sub-s. 9, of the Act of 1917 does not apply to the complainant. He is not a person who, in respect of the Home farm, has suffered any loss by reason of the exercise of the powers conferred by the section. He took the land subject to the notice or order served on Lady Carlisle before his agreement of tenancy. The notice is a personal notice. Sect. 9, sub-s. 1, of the Act of 1917 speaks of the "person on whom any notice is served under this section." The notice is to be read into the cultivation covenants which the complainant has entered into with Lady Carlisle. The person on whom the notice is served is the only person who is liable to a penalty under regulation 2 M (3.) of the Defence of the Realm Regulations, for not carrying out the requirements of the notice, and that person alone can claim compensation.

As to C., it cannot be said that in no circumstances can fields specified in different orders be combined in calculating whether the complainant has suffered a loss. The fields may be next each other or in the same farm. It is not contended that if the fields were far apart they could be combined. Here the fields should be taken together.

As to D., the arbitrator was appointed and the arbitration was held after the complainant made his claims for loss in 1918 and 1919. "The loss" in s. 9, sub-s. 9, of the Act of 1917 means the loss up to the date of the arbitration in respect of the field in question. All actual profit and loss must be

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entitled to be paid by the Board such amount or amounts by way of periodical payments or otherwise as may represent the loss."

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taken into account down to the time of the arbitration, including all reasonable inferences as to the future which may be properly drawn so as to ascertain all the profit and loss resulting from the order. The loss must be ascertained once for all: *Bwllfa Collieries* v. *Pontypridd Waterworks Co.* (1)

Cautley K.C. and *Harold Morris* for the complainant. As to A., the Corn Production Act, 1917, was passed for the purpose of increasing the production of corn, and s. 9 must be read in that light. The scheme of sub-s. 9 is to give compensation to the person who has grown the corn and has in consequence suffered loss owing to the order to cultivate in a particular way. The right to compensation is not limited to the person on whom the order is served. The complainant was "interested in the land" during the time when the loss was incurred. Lady Carlisle was bound to do the work under the order, and the complainant took over her liability and carried out the order. If the order were not complied with, the Board might, under s. 9, sub-s. 3, take possession of the land and determine the tenancy, and therefore the tenant was bound to carry it out. He is therefore entitled to compensation.

[They were not called upon to argue C.]

As to D., the complainant, having sent in his claim on September 28, 1918, for loss suffered in 1918, was entitled to have compensation for that loss assessed then, and the delay in holding the arbitration until after the claim for 1919 had been sent in cannot affect his right. It would be otherwise if the claim for 1918 had not been sent in until the same time as the claim for 1919, when both years would have had to be considered together. The claim having been made in September, 1918, the loss down to that date must be assessed irrespective of the year 1919.

Konstam K.C. in reply.

BANKES L.J. The first question in this case is whether the occupier of land has a right to compensation for damage which he says he has suffered as the result of the service of

(1) [1903] A. C. 426.

what are commonly called ploughing orders, although he was not the person upon whom the ploughing orders were served. The second question is whether, inasmuch as in this particular case two separate notices to plough were served, the arbitrator ought, for the purpose of ascertaining the loss (if any), to combine all the lands comprised in both notices, or whether he ought to deal with the land comprised in each notice separately. The third question is whether the arbitrator is bound in law to treat the claimant's claim in respect of each of the two years which were under consideration separately, or whether he ought to deal with the experience of the two years.

In 1918 the Countess of Carlisle had in hand two farms, and it is important to notice that they were two separate farms; one was the Home farm, and the other was the Low Gaterley farm. She had, on October 11, 1917, entered into an agreement to let the Low Gaterley farm to the claimant, but he did not in fact enter into occupation till April 6, 1918. As to the Home farm, she had not entered into any agreement to let it or to part with it at the time of the service of the notice to which I will now refer.

On January 8, 1918, the Agricultural Executive Committee caused a notice to be served upon the Countess in reference to 108 acres of the Home farm. It is described under the heading "Name of Farm" as the "Home Farm." The second notice was dated February 23, 1918, and had reference to 121 acres of what is described in the notice as part of the "Castle Howard Home Farm." In both notices the farm is described as the Home Farm, and if the case had been one where the Agricultural Committee had served a number of notices, each one having reference to a different field in the same farm, I am not at all prepared to say that I should have come to the same conclusion on one of the points as that at which I have arrived in this case where there are two farms. A reference however to the Ordnance map shows that the fields are many in number and quite distinct, and the county court judge has found that there were two separate holdings, one the Home farm, and the other the Low Gaterley farm.

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Therefore we are dealing with two notices, each applying to a distinct and separate farm. The Countess complied with the notice to some extent before she let the Home farm to the claimant on February 27, 1918. So that as from February 27, 1918, the claimant was in the position of a person who, under agreement with the landlord, was about to enter into possession of both farms on the same date—namely, April 6, 1918.

We are not told anything of the actual terms of the letting. All we do know is that in the tenant's notice he describes his tenancy as from year to year, expiring on April 6 of any year, but there is no indication as to any agreement between the parties in reference to the ploughing notices, except that—and it seems to me to be very significant—the tenant paid the Countess whatever had been the cost to her of the ploughing executed in compliance with the notice down to the time that he took possession. I think that that clearly points to this conclusion, that as a matter of business between this landlord and tenant the position was taken to be that the ploughing notices must be complied with, either by the landlord or by the tenant, and that the tenant completed the ploughing, because he considered that he was under an obligation to do so.

The notices were served by the Agricultural Executive Committee under the Defence of the Realm Regulation 2 M (1.) (*e*), which gave the Committee power "by notice served on the occupier of any land to require him to cultivate the land in accordance with such requirements as the Board" of Agriculture and Fisheries "may think necessary or desirable for maintaining the food supply of the country"; and the requirement in each of these two cases was "to plough up and convert into tillage the land described below and to properly cultivate the said land and produce thereon, in 1918, either a crop of corn or a crop of potatoes." In addition to the power of serving these notices, the Committee had power under clauses (1.)(*a*) and (*f*) of the Regulation either to enter on and take possession of any land which in their opinion was not being so cultivated as to increase as far as practicable

the food supply of the country; or by notice served on the tenant of any land which, or part of which, in the opinion of the Board, was not being so cultivated as to increase as far as practicable the food supply of the country, determine his tenancy. I agree with Mr. Konstam that these last two powers do not depend upon the preliminary of the service of the notice to cultivate, but one cannot lose sight of the fact that a person in this tenant's position would know that in case of non-compliance with the orders to plough the Committee had in reserve those two powers. The Defence of the Realm Regulations contain no reference to compensation; the provisions in reference to compensation are contained in the Corn Production Act, 1917, and upon those provisions the determination of this matter depends.

The material provision in the Corn Production Act, 1917, is s. 9, sub-s. 9, which provides that: "Any person who is interested in any land in respect of which any notice is served or order made under this section or of which possession is taken under this section, and who suffers any loss by reason of the exercise of the powers conferred by this section shall, if he makes a claim for the purpose . . . . be entitled to be paid by the Board such amount or amounts by way of periodical payments or otherwise as may represent the loss." There are two conditions which a person claiming compensation must fulfil. He must show, first, that he is interested in the land in respect of which the notice is served, and, secondly, that he has suffered loss by reason of the exercise of the powers conferred by the section.

The first point to be determined is whether the claimant was at any material time interested in the land in respect of which the notice was served. The section does not define any point of time at which the interest must exist, and it seems to me that it is sufficient to satisfy the requirements of the section if a person shows that he was interested at any material time. A material, if not the most material, time is the time when the loss is alleged to have occurred, and the claimant was certainly interested in the land at that time, because he became the tenant on April 6, 1918, before the

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ploughing was completed and before any of the crops were sown in respect of which the loss is said to have occurred. He complies, therefore, with the condition of being interested in the land.

The next point is that the claimant has not suffered any loss, at any rate in respect of the Home farm, by reason of the exercise of the powers conferred by the section, on the ground, as I understand the argument, that he was neither the occupier, nor had agreed to become the occupier, of the land at the time the notice was served; that it is only the occupier upon whom the notice is served who can be prosecuted; that the claimant did not do the ploughing because the order had been served upon the Countess, but because of his agreement with the Countess under which the relationship of landlord and tenant was created, and under which as tenant he in fact ploughed; and that therefore the loss, if any, was caused by his becoming tenant to the Countess, and ploughing under his agreement with her. The claimant, on the other hand, says that the farm let to him contained a certain amount of pasture land, and that land would have remained pasture but for the notice served upon the Countess, which he considered binding on him in this sense, that if he did not comply with it the Committee would have brought pressure to bear either upon the Countess or upon him, and would have compelled him to do the ploughing; and that therefore he is justified in saying that any loss he has suffered as the result of ploughing was a loss "by reason of the exercise of the powers conferred by this section."

Without attempting to give anything in the nature of an exhaustive definition of what may be a loss suffered by reason of the exercise of the powers, I think that this particular tenant has brought himself within the language and intention of the legislature as expressed in the Act. I think that the county court judge was justified in saying that this tenant was not only interested in the land but also could claim as a person who had suffered a loss by reason of the service of the notices upon his landlady, he being at the time of the service under agreement with her to take one of the farms,

and shortly after entering into an agreement to take the other farm, and he himself having carried out the orders to plough which had been served upon her.

The next point is whether the arbitrator should, in assessing the amount of compensation, consider the net result to the tenant of the ploughing operations upon all the land comprised in both notices, or whether he should treat each notice separately? The arbitrator states the point in this way: [The Lord Justice read para. C. above.] Here again it seems to me to be impossible to lay down any rule which will be applicable to every case. Scrutton L.J. put the case of a notice to the same individual in reference to a farm in Cornwall, and a farm in Northumberland, and Mr. Konstam naturally said that he could not contend in that case that the lands comprised in both notices should be considered as a whole. At the other extreme I put the case of a number of notices being served, one in respect of each particular field in the same farm. Now this case seems to me to fall between the two extremes, and it is clearly a case in which the tenant is entitled to say: These were two separate holdings, the executive committee served a separate notice in respect of each holding, and the loss in respect of each of those holdings, which the committee had treated as separate, should be dealt with separately. I think the view taken by the county court judge on that point was right.

The last point is this. It is said that the tenant is entitled to have his position in 1918 considered separately from his position in 1919, if it turned out that he had made a loss in 1918 and a profit in 1919. Here again I do not think it is easy, nor do I think it is wise, to attempt to lay down a rule which will apply to all cases, but when once the facts of this particular case are ascertained it seems to me that there can be but one answer to that contention. The facts are these: The tenant sent in a claim on September 28, 1918, for the season of 1918. It was not a complete year, because the ploughing orders were only served in January and February. He might have insisted upon that claim being dealt with then, and if he had done that the question would have arisen,

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which does not arise here, whether on a claim confined to the season's working it would be competent to the committee to say one of two things: Next year you, the tenant, will be going to make a profit, and we may take that into account; or if we confine the claim to the result of the working in 1918, you, the tenant, having made your claim in 1918, cannot make another claim in 1919 in respect of anything that occurred in 1918. We have not to consider that. The tenant having sent in a claim in September, 1918, there is no evidence either that he desired to have it determined then and there, or that he was not willing to wait and see whether another season might not mitigate or increase his loss. We know nothing about it, except that he made a claim and nothing was done. In July, 1919, he sent in another claim for 1919. The season had not expired, but the time had come when, under the Regulations, notices had to be sent in. In December, 1919, the arbitrator was appointed, and the arbitration commenced on December 30. What had the arbitrator before him then? He had the experience of the two years. *Bwllfa Collieries* v. *Pontypridd Waterworks Co.* (1) and other cases show that under these circumstances, unless there is something very special in this particular case, the arbitrator's duty is to assess the compensation payable upon all the materials before him. Mr. Cautley admits that that is so if the tenant had sent in a claim in July, 1919, comprising both his 1918 and 1919 experiences, but he says that, because he sent in a claim in 1918, he has a right to ask the arbitrator to ignore what happened in 1919, and to give him the whole of the loss he suffered in 1918. I am unable to follow the reasoning. I do not accept the proposition which the county court judge seems to have accepted, that the tenant had a right in September, 1918, to have his claim adjudicated upon and dealt with as it then stood, and that, because it was not done then, it must be done in December, 1919.

I think that the appeal must be allowed to this extent, by answering the last question put by the arbitrator, not quite

(1) [1903] A. C. 426.

in the form of words that he uses, but in the sense that he should take into account the experiences of the two years, and not confine himself to dealing with each year separately.

SCRUTTON L.J. The Agricultural Executive Committee of the North Riding of Yorkshire made two ploughing orders in relation to land owned by the Countess of Carlisle for the purpose during the war of increasing the cereal production of the country. A tenant who was in occupation during the operation of those ploughing orders claimed compensation under the legislation to that effect, and the arbitrator, to whom the Act has referred the matter in the first instance, has stated a special case consultatively for the opinion of the county court judge, and when the questions are answered the matter goes back to him for assessment of damages. The county court judge having stated his opinion, an appeal has been brought to this Court.

The legislation is somewhat obscure. I do not know how many cases there are awaiting decision, and how they differ from the facts of this case, but I can see a good many possible difficulties in the working out of the Act. In these circumstances I think the safer course is, as far as possible, to deal strictly with the questions which the arbitrator asks the Court. I do not feel that I know enough about the facts to say anything which may interfere with the arbitrator when he comes to assess the compensation.

The first question arises in this way: The tenant who claims compensation in respect of one of the notices was not at the time when the notice was given interested in the land, but under the terms of his tenancy he became interested after the notice, and did in fact deal with certain pasture land according to the notice. The landlord had dealt with it partially before the tenancy commenced, and the tenant paid the landlord for the amount which the latter had expended in the partial performance. In these circumstances the point taken before the arbitrator was that, as the tenant became interested after the order had been served, and could not have been prosecuted for non-compliance with it, he could not claim

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compensation. That is the question as it is stated in the case, and what is meant is made clear by the fact that when the third question is asked the arbitrator begins: "If it be determined that the complainant would be entitled to compensation for the loss (if any) suffered by reason of the ploughing required by each of such orders." It is clear that the point which was being argued before the arbitrator, and on which he states the case, is: Can I give the complainant compensation, seeing that he was not interested in the land at the time when the notice was served; no notice was served on him, and, so it is argued, he could not therefore be prosecuted for not carrying out its terms. That is not the point which has been argued before us. As I understand the argument, the point argued before us is this: Inasmuch as the tenant was not bound, because a notice had not been addressed to him, he cannot have suffered any loss by reason of the exercise of the powers conferred by this section or by the regulations. As I have said, the form in which the arbitrator has stated the third question shows that the point argued here was not argued before or present to the mind of the arbitrator. In these circumstances I propose to decide the question which was asked by the arbitrator, and not to express any final opinion on the point argued by Mr. Konstam, especially as the matter is going back to the arbitrator for the express purpose of his assessing the loss by reason of the exercise of the powers conferred by the section.

The point which was argued before the arbitrator turns on the wording of sub-s. 9 of s. 9 of the Corn Production Act, 1917: "Any person who is interested in any land in respect of which any notice is served or order made under this section . . . and who suffers any loss by reason of the exercise of the powers conferred by this section" shall be entitled to compensation. I think the effect of the argument addressed to the arbitrator is to read "who is interested" as "who is interested at the time when the notice is served." I do not find any warrant in the section for making that interpolation. I think the section means "who is interested at the time when he suffers loss," and that appears to be a very reasonable

construction for carrying out the purpose of the Act—namely, to require landowners or tenants in the interests of the nation to deal with their land in a way they would not otherwise deal with it, and to give them compensation if they suffer any loss through dealing with the land in pursuance of the directions given. While I do not express any final opinion on the point which Mr. Konstam argued, my present impression is that a landlord or tenant who knows that an order has been made on another person, and may be made on him, and who, because of that knowledge, obeys the order without the formality of service, suffers a loss by reason of the exercise of the powers conferred by the section. I do not finally decide it, and I reserve liberty to reconsider it, if the point is directly raised before us again. That answers the first question put by the arbitrator.

The second question is whether, when two notices are served, each relating to a different piece of land, and two claims for compensation are made, it is possible to set off one against the other; in other words, must the arbitrator look at the profit and loss made on all the land comprised in the two notices, and only give compensation for the balance of loss, if any. I am not prepared to say that there may not be cases, although of an exceptional character, where this may be done; cases of mistake, cases where out of abundance of caution a notice is given for each field in one holding, and the like; but as a general rule where there are separate farms and separate notices, the arbitrator is not at liberty to make a balance sheet dealing with all the holdings, but should confine himself to the holding covered by a particular notice. That answers the second question in the way the arbitrator has asked it.

The third and last question I understand to be this. The tenant in this case put in two claims, one in 1918, and one in 1919. The question asked is in substance whether, on the 1918 claim the arbitrator is entitled to take this view: you, the tenant, show a loss in 1918, but that is only preliminary to a profit in 1919 and the following years, and I may take into account whether you have suffered any loss on the whole

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by reason of the exercise of the powers, and I am not bound to limit myself to the admitted loss which you have suffered in 1918. On that question, in my view, without desiring to cover the detailed facts which may raise separate questions, the loss by reason of the exercise of the powers has to be looked at as a whole, and if the tenant says that he has suffered a loss, it is open to the arbitrator to say: You have suffered a loss in the short period you propose to submit to me, but I find as a fact that your loss will be the prelude to a much greater gain in the future, and I find that you have on balance suffered no loss. It is true that that involves prophecy. Assessment of damages or compensation frequently involves prophecy. A plaintiff suffers from an undoubted real nervous shock. It may be that when the trial is over he will recover quickly. It may, on the other hand, be that the defendant's doctors, who say he will recover quickly, are wrong, and as a matter of fact his nerves are shattered for life. The Court has to assess once for all the damages, though it does not know what will happen in the future. It has to form the best estimate it can. In the same way in this case it appears to me that the arbitrator, who has to say whether a loss has been suffered by reason of the exercise of the powers, has to look at the whole effect of the exercise of the powers, and not merely at their effect in the first season, which may be merely preparatory to great gains in the future. In this case in the first claim, which is for the year 1918, I think the Committee are entitled to prove, if they can, that the loss, if any, in that year will result in much greater gain in the future, and the arbitrator should take that into account. In the same way when in 1919 compensation is assessed, the arbitrator should look at the facts which have happened up to that time, and in my view either side is also at liberty to look at the consequences after 1919 of the exercise of the powers. I differ therefore from the county court judge on the point which he makes in the fourth answer, where he apparently takes the view that on the 1918 claim he must shut out of consideration what may happen in subsequent years. I think he is bound to look at the whole effect of the exercise

of the powers, and not merely the effect up to the particular time when the claim is put in.

I have explained my views at some length because I think the case is of considerable importance, but as I follow the judgment of my Lord, I think he and I are in substantial agreement in the view we take of the case.

ATKIN L.J. As far as the first point is concerned, if one were to confine one's attention simply to the question as asked I think it admits of being easily answered, because the question as asked seems only to raise the point whether or not a person may claim compensation who has not in fact been served with a notice under the Act. The answer to that is plainly that he can, because the Act contemplates that the landlord of a tenant upon whom a notice has been served may obtain compensation; and it is, to my mind, plain, and I do not think it is disputed, that if a landlord suffers loss, by reason of the exercise of their powers by the Agricultural Committee, through the default of his tenant, he may recover compensation. The more important question is whether a tenant, who has not been served with a notice and therefore is not subject to the express penal consequences of the Defence of the Realm Regulations, but who complies with the notice, can be said to have suffered loss by reason of the exercise of the powers conferred by the section.

In this particular case it appears to me the matter is really concluded by the admission that was made. It was admitted that the tenant in this particular case, though he was not served with the notice, was entitled to compensation in respect of the Low Gaterley farm which he had agreed to take but of which he was not in fact in occupation at the time the notice was served. I am unable to draw any distinction between that case and the case of the Home farm, where he had not made an agreement for a tenancy until after the notice was served. In neither case was the notice served upon him, nor could it have been as he was not the occupier. Confining oneself to the facts of this case, I think that where one finds that the Act contemplates the operation of the

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orders continuing for several seasons, and therefore must contemplate that the occupation of a particular farm may alter; and when one finds that, if the occupier does not comply with the order, he is subject to one of two very serious consequences—namely, either that the tenancy may be determined by the Board of Agriculture, or that the Agricultural Committee may themselves take possession—and when one finds that the successor in the occupancy, having those consequences held over his head, accepts the burden and pays the cost of complying with the order, the right conclusion to draw is that if he does suffer loss he suffers loss by reason of the exercise of the powers conferred by the section.

I do not propose to add anything to what has been said on the second point. I entirely agree with what has been said by my Lord and by my brother Scrutton.

Upon the third point I think it is to be noticed that there is nothing in the provision as to compensation which suggests that the loss is to be ascertained in respect of each season or periodically. All that it says is that any person who is interested in any land, and who suffers any loss by reason of the exercise of the powers conferred by the section, shall be entitled to compensation. I think it is important to notice that he must make that claim for compensation within a limited period, a period which is fixed by the Board of Agriculture at twelve months from the date of the exercise of the powers, or a little longer in some cases, inasmuch as the order limiting the time was not made until the Act had been in operation for more than twelve months. It appears to me clear that the loss has to be ascertained once for all, because it is a loss which has to be calculated in respect of the effect of an order which may operate for many seasons, at any rate for more seasons than one, after the time within which the claim must be made; and therefore the arbitrator has to look into the future to see what loss has been suffered. He must make an anticipatory estimate of what the loss is going to be, just as is done in all cases where the loss is a continuing loss. There is nothing to prevent the parties from agreeing, if they so desire, that the loss may be compensated by reference to

any particular period, or in any other mode they think fit; but, unless they do so agree, in estimating the loss the arbitrator must take into account the future effect of the order. He has to weigh the advantages and the disadvantages, which can be expressed in terms of money, and it is the balance of those advantages and disadvantages, known if they are known, estimated if they can be estimated, which is to determine what in fact the loss is.

For these reasons I agree that the fourth question in the case should be answered in the manner indicated by my Lord.

Appeal allowed in part.

Solicitors for complainant: *Bell, Brodrick & Gray, for Soulby & Ridge, New Malton.*

Solicitors for Agricultural Executive Committee: *Ridsdale & Son, for George Crombie & Sons, York.*

W. F. B.

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Ex parte MALONE.

County Court—Jurisdiction—Action for Declaration and Injunction—Damages not claimed nor recoverable in Law—Application to amend by claiming Damages under 100*l.—Refusal of Leave—Damage "clai ed"—Jurisdiction to entertain Action—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 56—*County Courts Act,* 1903 (3 *Edw.* 7, *c.* 42), *s.* 3—*Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89.

A member of a trade union brought an action against the trade union in the county court, his particulars of demand containing a claim for a declaration that a resolution of the trade union purporting to expel him from the union was ultra vires and void, and an injunction to restrain the trade union from acting upon the resolution. No claim for damages was included in the particulars of demand, and even if it had been included no damages could have been recovered by reason of the decision in a previous case. When the action came on for hearing, an application was made on behalf of the plaintiff for leave to amend by adding a claim for an amount of damages which was not more than 100*l.* The application

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was refused, but at the request of the plaintiff, and on the evidence before the Court, the damages were assessed at that amount. The county court judge declined to entertain the action on the ground that he had no jurisdiction to do so :—

Held, that in these circumstances the county court judge had jurisdiction to entertain the action as regards both the declaration and the injunction, and that a rule should be made absolute requiring him to hear and determine it.

Stiles v. *Ecclestone* [1903] 1 K. B. 544 considered and applied.

Kelly v. *National Society of Operative Printers' Assistants* (1915) 84 L. J. (K. B.) 2236 applied.

RULE NISI for an order directing a county court judge to hear and determine an action.

The United Society of Boilermakers and Iron and Steel Ship Builders was a trade union duly registered under the Trade Union Acts, its registered office being at Newcastle-on-Tyne, and it had rules which were duly registered under these Acts. The Society consisted of an unlimited number of members, who were grouped into local branches and districts, and it had an executive council and a general council which met at the registered office.

Thomas Malone, the applicant, was a member of the Society, and belonged to its Birkenhead branch.

In August, 1918, the applicant made an agreement with a fellow-member named Marsh to buy from the latter a suit of mercantile marine officer's uniform for 8*l.*, and took away this uniform, except the overcoat, for use by him as a temporary naval officer. The applicant alleged that subsequently, finding he could not get another post in connection with which the uniform could be of use, he wrote to Marsh offering to return the uniform and pay 2*l.* for its use; but Marsh denied having received the letter. On January 27, 1919, Marsh wrote to the applicant pressing for payment of the 8*l.* A few days afterwards Marsh laid a complaint against the applicant regarding his non-payment for the uniform before the district committee of the Society. On May 5, 1919, the district committee, after consultation with the executive council and acting on the instructions of the latter body, notified the applicant that unless the debt was paid by him he would be expelled

from the Society. At no time, however, did any one suggest that there had been any fraud on the part of the applicant. On September 2, 1919, the district committee passed a resolution which purported to expel the applicant from the Society, and a notification that he was so expelled appeared in the Society's monthly report for October 1919. The executive council confirmed the district committee's resolution. On October 17, 1919, the applicant, who was then engaged on work for the Manchester Pontoon Company, earning on the average 8*l.* 4*s.* per week, was discharged by the foreman without any notice, the latter having been instructed by the Society's district delegate to take that step in accordance with the notification in the October report. Thereafter the applicant was out of work for eleven weeks, and the fact that he was a "run out" member of the Society prevented him from getting other work. In consequence of his expulsion the applicant suffered damage in loss of wages and superannuation benefit.

On November 21, 1919, the applicant brought an action against the Society in the Birkenhead County Court, his claim as set forth in his particulars of demand being for (1.) a declaration that the resolution of the District Committee that the applicant be expelled from the Society was ultra vires the Society and void as being unauthorized by the constitution of the Society, or by any of its rules, or by the Trade Union Acts, and that it was illegal, unconstitutional, and against public policy; (2.) an injunction restraining the Society or the district committee from acting upon or enforcing the resolution. No claim for damages was included in the particulars.

On December 20, 1919, a meeting took place between the applicant and a representative of the executive council at which a document was drawn up and signed by these parties which stated that the applicant agreed to repay the 8*l.* to Marsh in certain instalments, and that on that understanding the Society agreed to the applicant's reinstatement as a member. As from January 1, 1920, the

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applicant was in effect reinstated, and on January 6 he returned to his usual work.

On February 24, 25 and 26, 1920, the action was tried in the county court. Counsel for the plaintiff, in his opening statement made an application for leave to amend by adding a claim for 88*l.* damages, but the judge refused to allow the amendment. The judge then heard the evidence.

On March 23, 1920, the county court judge delivered judgment. He found the facts stated above and also that so far as related to procedure the rules of the Society were duly complied with by all parties concerned. He also found that the resolution by which the plaintiff was expelled was ultra vires, and stated that had it been in his power he would have made the declaration asked for, though as the plaintiff had then been reinstated in membership he would not have granted an injunction. He stated that he had, however, come to the conclusion that there was no jurisdiction in the county court to entertain the plaintiff's claim, although the grounds on which he had arrived at that view had not been pleaded by the Society or raised by them in argument. It had been submitted on behalf of the plaintiff that this was a personal action where the debt, demand, or damage did not exceed 100*l.*, so as to come within s. 56 of the County Courts Act, 1888. (1) It was contended that since no

(1) County Courts Act, 1888 (as subsequently amended by the County Courts Act, 1903, s. 3), provides :—

Sect. 56. "All personal actions, where the debt, demand, or damage claimed is not more than one hundred pounds . . . . may be commenced in the Court; and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

Sect. 81 : "It shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more actions in any of the Courts; but any plaintiff having cause of action for more than one hundred pounds, for which a plaint might be entered if not for more than one hundred pounds, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding one hundred pounds; and the judgment of the Court upon such plaint shall be in

damages were claimed they did not exceed 100*l*. and that therefore s. 56 applied, but that contention required careful consideration. A county court had power to grant an injunction in actions within its jurisdiction, and even when an injunction only was claimed it had such power where, had damages been claimed, they must necessarily have been within the jurisdiction: *Stiles* v. *Ecclestone*. (1) It was, however, by no means clear that the damages if they had been claimed would necessarily have been within the jurisdiction. He (his Honour) had in fact at the request of counsel for the plaintiff, in spite of his having refused to allow the claim to be amended by adding a demand for damages, assessed them at a sum which was within the jurisdiction in accordance with the plaintiff's evidence as to his loss of earnings, in order to facilitate a decision on appeal. It seemed to him, however, that the question of jurisdiction in an action under s. 56 of the Act of 1888 (2) must be determined with reference to the facts as alleged when the action was brought, i.e., in the particulars of claim. It could not be competent to wait until the evidence in the action itself disclosed whether the amount which it was sought to recover exceeded the jurisdiction or not. The fact that the damages were not actually "claimed" did not affect the question, for to refrain from claiming damages when, if claimed, they would be in excess of the jurisdiction, could not confer on the Court powers which it would not otherwise possess. There was here no case of "abandoning

full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

Judicature Act, 1873, s. 89:—

"Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

(1) [1903] 1 K. B. 544.

(2) See note (1) ante, p. 304.

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excess," so as to give jurisdiction. The point was: What was the amount of the damage sustained? If it was on the face of the proceedings—i.e., as set out in the particulars of claim—necessarily within the county court scope, that Court had jurisdiction. Otherwise it apparently had not. That was, he thought, the real effect of *Stiles* v. *Ecclestone.*(1) In the present case, so far as appeared from the particulars of claim, the damages which might have been proved, had any been claimed, might well have exceeded the jurisdiction. Therefore they were not necessarily within the jurisdiction within the meaning of *Stiles* v. *Ecclestone.*(1) The case of *Kelly* v. *National Society of Operative Printers' Assistants* (2) had caused him (his Honour) some difficulty in that connection. At first sight it would appear that that decision involved a finding that a mere claim for a declaration and injunction, as in the present case, was within the jurisdiction, but, in the first place, the point did not seem to have been considered, and, in the second place, the fact that the damages sustained were within the county court scope was apparent from the amount claimed by the particulars, although that claim was, in the event, held to be incompetent. He had therefore come to the conclusion that as the particulars did not show that the amount of the damage was necessarily less than 100*l.*, he had no power to entertain the application for an injunction. In any event he should not have granted an injunction, but he had thought it necessary to consider whether he had jurisdiction to grant an injunction in order to decide whether he had power to make the declaration. Express powers in this connection were given to the High Court by the Rules of the Supreme Court, 1883, Order xxv., r. 5, but there was no corresponding rule in the county court. As to s. 89 of the Judicature Act, 1873 (3), that only authorized certain relief and remedies in cases when the inferior Court already possessed jurisdiction to deal with the claim. It conferred in itself no jurisdiction. Since he (his Honour) had no jurisdiction to

(1) [1903] 1 K. B. 444. (2) 84 L. J. (K. B.) 2236.
(3) See note (1) ante, p. 304.

entertain the claim for an injunction, it appeared to follow that he had no power to make the declaration, there being no independent cause of action within the jurisdiction. In these circumstances his judgment must be for the defendant Society, or, perhaps, strictly, in accordance with s. 114 of the Act of 1888, the action must be struck out, the respective parties to bear their own costs.

Merriman K.C. and *O. S. Hooper* showed cause. The county court judge was right in declining to hear and determine the action brought by the applicant against the Society. The county court has no power to make a declaration or to grant an injunction, except in an action which is within its jurisdiction. The action brought by the applicant was not within the jurisdiction of the county court. Under the County Courts Act, 1888, s. 56 (1), as amended by the County Courts Act, 1903, s. 3 (1), the county court has jurisdiction to entertain a personal action in which a debt, demand or damage not exceeding 100*l.* is "claimed," and accordingly in an action of that kind has no doubt jurisdiction to make a declaration or grant an injunction. Further, it has been held in *Stiles* v. *Ecclestone* (2) that the county court has jurisdiction to give relief of the latter description in an action in which damages, though not claimed, have been fixed by the parties at less than 100*l.*, and would, if claimed, be undoubtedly recoverable. The Judicature Act, 1873, s. 89 (1), provides that every inferior Court, "as regards all causes of action within its jurisdiction for the time being," shall have power to grant such relief as the High Court can grant. Under that section, which, in so far as it applies to the county court, must be read in connection with s. 56 of the Act of 1888 (1), the jurisdiction of that court to make a declaration or grant an injunction does not extend beyond the cases in which it has jurisdiction by virtue of the latter section. There is no rule in the county court corresponding to Order XXV., r. 5, of the Rules of the Supreme Court, which provides that no action in the High Court shall be open to objection on the ground that a merely

(1) See note (1) ante, p. 304. (2) [1903] 1 K. B. 544.

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declaratory judgment or order is sought thereby. The result of these various provisions is that the jurisdiction of the county court to make a declaration or to grant an injunction is limited to actions in which a debt, demand, or damage not exceeding 100*l.* is either claimed or recoverable.

In the action in question a debt, demand or damage not exceeding 100*l.* was neither claimed nor recoverable by the applicant. No debt, demand or damage was claimed in the action. The claim for a debt, demand or damage must be made at, or referable to, the time when the action is brought. When the action in question was brought no claim for any debt, demand or damage was included in the applicant's particulars of demand, and the judge refused leave to amend the particulars by adding a claim of that kind. The absence of any claim for damages cannot be treated as equivalent to a claim for damages amounting to nothing and therefore less than 100*l.* and within the jurisdiction of the county court. If it could be so treated, it would follow that in almost every case a plaintiff by simply omitting to claim a debt or damages could bring an action within the jurisdiction of the county court and claim consequential relief. Further, no demand or damage within the jurisdiction of the county court was recoverable in the action. In *Kelly* v. *National Society of Operative Printers' Assistants* (1) it was laid down by the Court of Appeal that in an action by a member of a trade union against the trade union for alleged illegal expulsion no damages are recoverable; and until that decision be overruled by the House of Lords it is of binding authority. Moreover, at the trial of the action the evidence showed that the damage alleged to have been sustained by the applicant exceeded 100*l.* and amounted to 150*l.*, and therefore, even if damages had been claimed or recoverable by the applicant, the action would presumably have been outside the jurisdiction of the county court. Since damages within the jurisdiction of the county court were neither claimed nor recoverable in the action, the county court judge had no power to grant a declaration nor an injunction.

(1) 84 L. J. (K. B.) 2236.

In *Kelly* v. *National Society of Operative Printers' Assistants* (1) it was no doubt held that in a case of this kind the plaintiff was entitled to a declaration and an injunction, but that case is distinguishable because there the plaintiff had claimed damages.

It would be dangerous to hold that in a case in which damages are neither claimed nor recoverable, and in which if they were claimed or recoverable they might exceed 100*l.*, the county court has jurisdiction to give relief by making a declaration or granting an injunction.

[*Osborne* v. *Amalgamated Society of Railway Servants* (2) was referred to.]

Lias, in support of the rule. The county court judge was bound to hear and determine the action.

The action was within the jurisdiction of the county court. As already stated, the County Courts Act, 1888, s. 56 (3), as subsequently amended, provides that "personal actions, when the debt, demand or damage claimed is not more than 100*l.*, may be commenced in the county court. The applicant's action in the county court for a declaration affirming his right of membership of the society, and for an injunction to prevent interference with that right, was a "personal" action within the meaning of that section. It is said that the action could not be entertained by the county court, because no debt, demand or damage was claimed in the action. It may be doubted, however, whether it be necessary, in order to give the county court jurisdiction, to entertain an action for a declaration or an injunction that a debt, demand or damage should be claimed in the action.

The High Court has undoubtedly jurisdiction under the Judicature Act, 1873, s. 89 (3), or otherwise to entertain an action for a declaration or an injunction, even where there is no claim for a debt, damage or other substantive relief: see *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4), and it would seem that under that the county court has the same jurisdiction. In *Osborne* v. *Amalgamated Society*

(1) 84 L. J. (K. B.) 2236.
(2) [1911] 1 Ch. 540.
(3) See note (1) ante, p. 304.
(4) [1915] 2 K. B. 536.

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of Railway Servants (1) Fletcher Moulton L.J. observed that since the passing of that enactment "the Courts have jurisdiction to make declarations without granting consequential relief, and even when consequential relief is not asked." As he there spoke of "Courts" in the plural, he must be understood to have referred not only to the High Court, but also to other Courts including the county court.

If, however, a claim for a debt, demand or damage was necessary in order to give the county court jurisdiction to entertain the action, the applicant in fact "claimed" damages within the meaning of s. 56 of the Act of 1888. (2) It is true that when he commenced the action he did not claim damages in his particulars of demand, because it had been decided in *Kelly's Case* (3) that in an action of that kind damages were not recoverable. When the action came on for hearing, however, an application was made on behalf of the applicant for leave to amend by adding a claim for damages. By causing that application to be made the applicant "claimed" damages under s. 56. The judge refused the application, but he had power to grant it under s. 87 of the Act, and he ought to have granted it. The damages which the applicant claimed were below the statutory limit of 100*l.*, being only 88*l.* There was no admissible evidence to show that he ever claimed damages exceeding 100*l.* The judge, notwithstanding his refusal to allow the amendment, found that the damages were in fact only 88*l.* He was wrong in holding that, as the particulars did not show that the damage was necessarily less than 100*l.*, he had no jurisdiction to entertain the action, because, even if the damages had exceeded 100*l.*, it was open to the applicant at any time to have abandoned the excess and so brought his claim within the jurisdiction of the county court: see County Court Practice, 1920, p. 82, *n.* The essential question raised in the action was whether the applicant was a member of the Society, and the county court had jurisdiction to deal with that question and to give consequential relief

(1) [1911] 1 Ch. 540. (2) See note (1) ante, p. 304.
(3) 84 L. J. (K. B.) 2236.

in respect of it: per Bankes J. in *Taylor* v. *National Amalgamated Approved Society.* (1)

Damages having been claimed which were not more than 100*l.*, the county court had jurisdiction to entertain the action in respect of the declaration and the injunction notwithstanding that the damages were not recoverable: *Kelly's Case.* (2) In cases of this kind in which damages are neither claimed nor recoverable in the county court, it would be more dangerous to withhold from that court jurisdiction to grant a declaration or an injunction than to give it that jurisdiction. A trade union has in general power under its rules to expel any of its members at once, as soon as it supposes that he has done some act meriting dismissal. If it expels him without good cause his only remedy is an action at law. If he brought an action for damages against the union he could not recover, because of the decision in *Kelly's Case.* (2) He could not in almost any case bring an action for a declaration of right or an injunction in the High Court because of the expense. Unless, therefore, he be entitled to bring an action for relief of the latter description in the county court he will be left without any legal remedy.

THE EARL OF READING C.J. In this case the applicant, Malone, has obtained a rule nisi calling upon the learned judge of the county court of Cheshire at Birkenhead to show cause why he should not proceed to hear and determine an action in that court which was brought by the applicant against the United Society of Boilermakers. Notwithstanding that the application is in the form of a mandamus, the question which it raises is, whether or not the county court judge was right in concluding that he had no jurisdiction to hear and determine the action. [His Lordship stated the facts of the case and continued:] The applicant's claim in the action as set forth in his particulars of demand was for a declaration that the resolution of a district committee of the Society that the applicant should be expelled from the Society was ultra vires

(1) [1914] 2 K. B. 352, 359. (2) 84 L. J. (K. B.) 2236.

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and void, and an injunction restraining the Society from acting upon or enforcing the resolution.

It is to be noticed that no claim for damages was included in the particulars. When the action came on for trial counsel for the applicant in the course of his opening statement made an application for leave to amend by adding a claim for damages amounting to 88*l.*, but that application was refused. Eventually, however, the county court judge did in fact, at the request of counsel for the plaintiff, assess the damages at that sum in accordance with the evidence then before the court.

When the action was before the county court judge he took the objection, and came to the conclusion that he had no jurisdiction to entertain it, his grounds being in substance: first, that no claim for damages within the scope of the county court was made in the action, and, secondly, that if a claim for damages had been made it could not in this case have been enforced in law because of the decision of the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants.* (1)

In order to determine whether or not these grounds were sufficient to justify the county court judge in declining jurisdiction regard must be had to s. 56 of the County Courts Act, 1888 (2), which, as subsequently amended, provides that: All personal actions, when the debt, demand or damage claimed is not more than 100*l.*, may be commenced in the county court.

As to the first of the grounds relied upon by the learned judge—namely, that there was no claim for damages—that I think was in fact without substance. In my judgment when the applicant's counsel in his opening statement made the application to the county court judge for leave to amend the particulars of demand by adding a claim for damages, he "claimed" damages within the meaning of s. 56 of the Act of 1888. (2 Further, as the application was to add a claim for damages amounting to 88*l.* only, and as the county court judge found on the evidence before him that the damages were of that amount, the applicant claimed damages which were "not more than 100*l.*" within the meaning of that section.

(1) 84 L. J. (K. B.) 2236. (2) See note (1) ante, p. 304.

Even if the damages claimed had been more than 100*l.* it would have been open to the applicant under s. 81 of the Act of 1888 (1) to bring the amount within the jurisdiction of the county court by abandoning the excess above 100*l.* It is not, however, necessary to consider that procedure here, for it is plain that the amount of the damages claimed by the applicant was not more than 100*l.* If the applicant had claimed and insisted upon an amount of damages which exceeded the county court limit, or, possibly, if he had claimed damages the amount of which was left vague and undefined, so that it might have exceeded that limit, then, no doubt, the county court judge would have been right in holding that the case was outside his jurisdiction; but he was not right in so holding where the amount of the damages, as claimed and as found by himself, was within that limit. The county court judge appears to have considered that as a claim for damages not exceeding 100*l.* was not included in the particulars of claim, and as he had refused leave to amend the particulars, he must treat the case as not being within his jurisdiction. He cannot have had in mind the case of *Stiles* v. *Ecclestone* (2), where it was held by Wills and Channell JJ. that an action in which there was a claim for an injunction but no claim for damages was within the jurisdiction of the county court, inasmuch as, if there had been a claim for damages, they must necessarily have been for an amount within the jurisdiction of the county court at which they had previously been fixed by agreement between the parties. To my mind, as regards the materiality of a formal claim for damages in the plaint note there is no essential distinction between that case, in which the parties had agreed the damages at a sum within the jurisdiction of the court, and the present case in which the county court judge has found that the damages would be within the jurisdiction.

Moreover, the Judicature Act, 1873, s. 89 (1), provides that every inferior Court, and therefore every county court, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant relief in as full and ample a

(1) See note (1) ante, p. 304. (2) [1903] 1 K. B. 544.

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manner as might be done in the like case by the High Court. It has been insisted on behalf of the Society that under that section the power of the county court to make a declaration or to grant an injunction is limited to causes of action within its jurisdiction, and it is obvious that that is so. The county court has no jurisdiction to grant a declaration or an injunction in an action which could not properly be litigated before it. It would be idle to suggest, for example, that relief of that description could be granted by that court in an action relating to land, or for libel, or for damages necessarily exceeding 100*l.*, because s. 56 of the Act of 1888 (1) expressly provides that the county court shall have no cognizance of any of these actions, and in none of them could a claim for any debt, demand or damage properly be made to support the action. If, however, the action be one which is not expressly excluded from the cognizance of the county court, and in which the debt, demand or damage is not necessarily more than 100*l.*, the county court judge may inquire into it and in a proper case grant a declaration or an injunction. I fail to see that a decision in favour of the present applicant would involve any danger of the county court being invoked in cases which are altogether outside its jurisdiction.

The second ground on which the county court judge declined jurisdiction was that in his opinion if a claim for damages had been included in the particulars of demand it could not have been enforced. He thought that, as in *Kelly's Case* (2) the Court of Appeal held that a member of a trade union, who alleged that he had been wrongfully expelled by a committee of the union, could not maintain an action for damages for breach of contract against the union, so in the action now in question the applicant could not recover damages in law against the Society, and therefore the county court had no jurisdiction to grant the relief claimed in the action. In taking that view the county court judge would appear to have been reading s. 56 of the Act of 1888 (1) as if it provided that the county court has jurisdiction where the debt, demand or damage "recovered"

(1) See note (1) ante, p. 304. (2) 84 L. J. (K. B.) 2236.

is not more than 100*l*. Counsel for the Society also suggested during the argument that under that section in order that the county court may have jurisdiction there must be some enforceable claim to a debt or damages. The section, however, only requires that a debt or damage not exceeding 100*l*. shall be "claimed," and it must be construed according to the plain meaning of its language.

It seems to me that when the county court judge declines jurisdiction he ought not to proceed to hear the evidence, try the case, and express an opinion as to how he ought to decide it if he had jurisdiction. In this instance the very fact that the county court judge heard the case and adjudicated upon it would seem to imply that he did not regard it as one which was necessarily outside his jurisdiction.

Notwithstanding the ingenious arguments that have been advanced in opposition to the application for the rule, I conclude that the action which was brought by the applicant against the Society was within the jurisdiction of the county court. The applicant having made an application for leave to amend his plaint note by adding a claim for damages, and it having been found that the damages if recoverable would have been less than 100*l*., the county court judge had jurisdiction to make a declaration and grant an injunction, although no claim for damages was included in the particulars of demand.

In my opinion this rule should be made absolute.

DARLING J. I concur in the judgment of the Lord Chief Justice, though not without some doubt and hesitation.

As regards the jurisdiction to make a declaration or to grant an injunction there is a wide difference between the county court and the High Court. In this respect the two courts do not stand upon the same plane. In the High Court a plaintiff may bring an action making a claim for a declaration or an injunction which is not coupled with a claim for relief of any other kind. He is entitled to maintain the action, even although the relief which he asks may be

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altogether useless, or may only become of value at some future time. In the county court, on the other hand, the jurisdiction depends upon the County Courts Act, 1888, s. 56 (1), which confines it to "personal actions where the debt, demand, or damage claimed is not more than 100*l.*" If a plaintiff in the county court brings an action in which he makes a claim for a declaration or an injunction simpliciter, that court has no jurisdiction to entertain the action, as is admitted on behalf of the applicant. In order that the action may be maintainable, that claim must be coupled with another claim for a debt, demand or damage which comes within the jurisdiction of the court.

In the present instance, the question has been raised whether the applicant in his action in the county court for a declaration and an injunction "claimed" other relief within the meaning of s. 56. That question has been dealt with and as I venture to think rightly decided by my Lord, and it is unnecessary that I should consider it again.

The further question remains, however, whether the claim for damages which the applicant coupled with his claim for an injunction and a declaration is a claim which would bring the case within the jurisdiction of the county court. The applicant's claim for damages was apparently a claim which could not be maintained in law. Since the decision of the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* (2) a member of a trade union cannot in such a case as this recover damages against the trade union. We cannot possibly speculate as to whether the House of Lords may or may not overrule the decision of the Court of Appeal in that case. We must take the law as it stands, and as it now stands the applicant's claim for damages could not be enforced. What puzzles me is to understand how such a claim as that could found the jurisdiction of the county court to grant a declaration or an injunction. My brother Avory, during the argument, put the case of a claim against a highway authority for damages for mere non-repair of the highway, which could

(1) See ote (1) ante, p. 304. (2) 84 L. J. (K. B.) 2236.

not be maintained in law, and asked whether such a claim as that would be sufficient to give the county court jurisdiction. Similarly, one might inquire whether an action in the county court for a declaration could be supported by a claim made by the plaintiff against the defendant for damages for no other reason than that the latter was rich and the former poor. These are further illustrations of claims which could not be maintained in law, and they may serve to illustrate the difficulty which I find in dealing with the present case.

In order that a claim may be within the jurisdiction of the county court it must be a claim in a personal action for a "debt, demand or damage" not exceeding 100*l.* within the meaning of s. 56. The question therefore comes to be whether the applicant's claim for damages, which could not be enforced in law, was a claim for relief which came within these words. As to the word "debt," I should take it to mean an actionable debt; but it is not here necessary to consider the meaning of that word, because the claim made by the applicant was certainly not in any sense a claim for a debt. The word "damage" likewise must, I think, be understood as referring to damages recoverable in law, and, if that be its meaning, it is obvious that it cannot apply to the damages which were claimed by the applicant. If there were no other word in the section, I should be disposed to conclude that the applicant's claim for damages did not come within it, and that the county court had no jurisdiction to entertain the action. The word "demand," however, also occurs in the section. In order to constitute a demand, it is not necessary that the relief demanded should be enforceable in law. A demand though ill-founded is nevertheless a real demand. The applicant's claim for damages, notwithstanding that it could not be enforced in law, was a demand within the meaning of the section. It was, therefore, within the jurisdiction of the county court, and was sufficient to support the action for a declaration and an injunction.

On this ground I concur in the decision of my Lord.

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AVORY J. I agree that this rule directing the county court judge to hear and determine the action should be made absolute.

I dissent with hesitation from the learned judge, whose judgment has been carefully prepared with regard to all the relevant authorities. On the other hand I think that it is very undesirable that a member of a trade union should be prevented from resorting to the county court for redress against the union unless it is quite clear that that court has no jurisdiction to entertain the action, for it is obviously expedient that a question such as that which has arisen between the applicant and this Society should be determined by a court of law, and by a court sitting in the locality where the dispute can most conveniently be dealt with.

In the judgment of the county court judge there seems to me to be some confusion between the case in which the court has no jurisdiction to entertain an action, and the case in which the court has jurisdiction to entertain the action, but has to determine whether or not the plaintiff has a good cause of action. I will endeavour to illustrate my meaning by two examples. Take first the case of an action brought in the county court in which the plaintiff claims damages for libel and an injunction. It is plain that in such a case as that the county court judge has no jurisdiction to entertain the action, because s. 56 of the Act of 1888 (1) expressly provides that the county court shall have no cognizance of any action for libel. Take, on the other hand, the case of an action brought in the county court against a highway authority, in which the plaintiff claims damages for injury sustained through the mere non-repair of a highway, and an injunction. The county court judge on looking at the plaint note would at once perceive that, as the claim for damages was in respect only of the non-repair of the highway, the plaintiff could not succeed in the action. That claim, however, would not oust the jurisdiction of the county court judge, whose duty it would be to entertain the case and to

(1) See note (1) ante, p. 304.

non-suit the plaintiff, or to give a verdict and judgment for the defendant. These instances may serve to show the distinction between the case in which the county court judge has no jurisdiction and the case in which he has jurisdiction but must hold that the plaintiff has not a good cause of action. The confusion between the two cases runs through the judgment of the learned judge, and appears, for example, in the following passage: "The point is 'what is the amount of the damage sustained?' If it is on the face of the proceedings, that is, as set out in the particulars of claim, necessarily within the county court scope, that court has jurisdiction. Otherwise, it apparently has not. This is, I think, the real effect of *Stiles* v. *Ecclestone*. (1)" With all respect to the learned judge, I do not think that that is the effect of *Stiles* v. *Ecclestone*. (1) It seems to me that the proper corollary to be drawn from that case is that, where it appears on the plaint note that the claim for damages is necessarily within the scope of the county court that court has jurisdiction: but that it is only where the claim is necessarily outside the scope of the county court that it can be said that that court has no jurisdiction. That I think is the true inference from *Stiles* v. *Ecclestone* (1), though it was not expressly drawn in that case. It was on that account that I put it to Mr. Merriman during the argument whether, in order to make good his contention, he must not go so far as to say that, there being no claim for damages on the face of the plaint note, the claim if made must of necessity be for more than 100*l*., and therefore outside the jurisdiction of the county court. The fact that a claim is for more than 100*l*. does not necessarily imply that the case in which it is made is outside the scope of the county court, for the plaintiff may be advised to limit his claim, and, if he chooses to limit it to 100*l*., he brings it within the jurisdiction. Even where, in the course of the trial, it may ultimately turn out that the amount of the damage actually suffered by the plaintiff is more than 100*l*., it does not follow that the county court has no jurisdiction, especially in view of the fact that it is

(1) [1903] 1 K. B. 544.

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open to the plaintiff who has claimed more than 100*l.* to abandon the excess above that amount. There is nothing in *Stiles* v. *Ecclestone* (1) to warrant the contrary of these propositions. That case only decides that the county court judge has jurisdiction to grant an injunction or to make a declaration where there is no claim for damages. In the case now in question, in order to deprive the county court judge of jurisdiction, it must at least be shown that the plaintiff's claim for damages must necessarily be over 100*l.* There is nothing here to suggest that the plaintiff's claim for damages must necessarily be over that amount.

The mere fact that if the plaintiff does make a claim for damages, the damages will not be recoverable by reason of the decision of the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* (2), and the claim for damages will be defeated, only puts the action upon the footing of an action against a highway authority for damages for the non-repair of a highway, and is not sufficient to deprive the county court judge of jurisdiction to hear and determine the action.

I agree that the case should go back to the county court judge to consider whether or not he ought to grant a declaration and an injunction.

Rule absolute.

Solicitors: *J. A. Behn, Liverpool; Arthur Sugden, for R. Barrow-Sicree, Liverpool.*

(1) [1903] 1 K. B. 544. (2) 84 L. J. (K. B.) 2236.

J. R.

[IN THE COURT OF APPEAL.]

C. A.
1920
Oct. 26;
Nov. 5.

BANQUE BELGE POUR L'ETRANGER *v.* HAMBROUCK AND OTHERS

[1919. B. 2351.]

Money had and received—Cheque obtained by Fraud—Transfer without Consideration—Currency—Title of Transferee—Banker and Customer—Right to follow Proceeds of Fraud.

If cheques be obtained by fraud and then transferred by the fraudulent holder to a transferee without consideration, the transferee acquires no better title to hold them than the fraudulent holder had.

If the fraudulent holder or his voluntary transferee pays the cheques into a banking account, *quaere* whether the true owner, having a right in equity to follow the proceeds or so much thereof as remains to the credit of the account, can recover the same amount by an action at law against the bankers or their customer for money had and received.

A clerk obtained by fraud from his employer a number of cheques purporting to be drawn by the employer upon the plaintiff bank. The clerk paid these cheques into an account with his bankers, who collected the amounts from the plaintiff bank and credited the clerk's account therewith. Against the amount so credited the clerk drew cheques and handed them without consideration, or for an illegal consideration, to a woman with whom he was living. She paid these cheques into her account at her bankers, and there stood to her credit a sum of 315*l.*, proceeds of the clerk's frauds.

The plaintiff bank brought an action against the woman and her bankers for a declaration that the 315*l.* was their property, and for an order that it should be paid out to them. The defendant bankers having paid the money into Court and been dismissed from the action:—

Held, that the plaintiffs were entitled to the declaration and order claimed against the female defendant.

Miller v. *Race* (1758) 1 Burr. 452; *Taylor* v. *Plumer* (1815) 3 M. & S. 562; and *In re Hallett's Estate* (1880) 13 Ch. D. 696 considered and discussed.

Judgment of Salter J. affirmed.

APPEAL from the judgment of Salter J. in an action tried before the learned judge without a jury.

The facts are stated in detail in the written judgment of Atkin L.J. The following summary is added to indicate the points raised in this appeal.

The Banque Belge pour l'Etranger brought an action against one Gustave Hambrouck, a Mlle. Spanoghe, and the

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London Joint City and Midland Bank, and claimed a declaration that a sum of 315*l.* standing to the credit of Mlle. Spanoghe at the Twickenham Branch of the London Joint City and Midland Bank was the property of the plaintiffs, and an order that it should be paid out to them. The defendant Bank paid the money into Court. As against them the action was stayed, but it proceeded against the defendants Hambrouck and Mlle. Spanoghe.

A M. Charles Pelabon was the proprietor of certain engineering works near Richmond known as the Pelabon Works. He was a customer of the plaintiff bank. The defendant, Hambrouck, was the chief assistant accountant at the works. By fraud he possessed himself of crossed cheques to the amount of about 6000*l.*, payable to himself, and drawn or purporting to be drawn, by M. Pelabon. These cheques Hambrouck paid into Farrow's Bank at Richmond where he had an account, and Farrow's Bank obtained payment of them from the plaintiff bank.

Hambrouck lived with the defendant, Mlle. Spanoghe. He drew cheques upon his account at Farrow's Bank and handed them to Mlle. Spanoghe, who paid them into her account at the Twickenham Branch of the London Joint City and Midland Bank. At the time when Hambrouck's frauds were discovered there was standing to the credit of this account a sum of 315*l.*, part of the proceeds of those frauds. For this money Mlle. Spanoghe had given no consideration except the continued cohabitation with Hambrouck as his mistress. The plaintiffs claimed to recover 315*l.* as aforesaid.

Salter J. gave judgment for the plaintiffs.

Mlle. Spanoghe appealed.

Langdon K.C. and *Walter Warren* for the appellant. The judgment of Salter J. was wrong. The London Joint City and Midland Bank acquired a good title to this 315*l.* Assuming that this money could be followed in the hands of the appellant, yet when she paid it into the bank the right to follow it was gone. "There is no doubt," said Lord

Abinger C.B. in *Calland* v. *Loyd* (1), "that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker." The reason is that it then ceases to be the money of the customer and becomes the money of the bankers. The relation of debtor and creditor between the bankers and their customer supersedes the right in rem of the original owner—namely, the right to follow the money: see per Lord Haldane L.C. *Sinclair* v. *Brougham*. (2)

Secondly, cheques are currency. When Hambrouck handed his cheques to the appellant, who took without notice of any defect in his title, he conferred a valid title upon her as against all the world: *Miller* v. *Race*. (3) Delivery of a chattel with intention to pass the property therein to the transferee gives him a good title as against all but the true owner. Delivery of money or currency gives a title which is valid even as against the true owner, notwithstanding that the transferee is a volunteer and the transaction a gift.

[*Clarke* v. *Shee* (4); *Hudson* v. *Robinson* (5); *Chambers* v. *Miller* (6), and *Moss* v. *Hancock* (7) were cited.]

Thirdly, the respondents are not the proper persons to sue. The person really damnified is M. Pelabon. Having parted with the money on his mandate they are not responsible to him.

Barrington-Ward K.C. and *Pritt* for the respondents. As to the third point, a bailee if wrongfully deprived of the goods bailed can recover them even though in the circumstances the loss of possession does not render him liable over to his bailor. The same principle applies to bankers. Either the money was theirs or they held it as agents for M. Pelabon. In either case they can sue to recover it.

As to the first point, the question is what is meant by Lord Mansfield's phrase when he said in *Miller* v. *Race* (8) that money cannot be recovered after it has "passed in currency."

(1) (1840) 6 M. & W. 26, 31.
(2) [1914] A. C. 398, 419.
(3) 1 Burr. 452.
(4) (1774) 1 Cowp. 197.
(5) (1816) 4 M. & S. 475.
(6) (1862) 13 C. B. (N. S.) 125.
(7) [1899] 2 Q. B. 111.
(8) 1 Burr. 452, 458.

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Lord Mansfield certainly did not mean that if A. tortiously obtains possession of a bank note for 500*l.* and hands it as a gift to B. who opens an account with it, the true owner cannot recover so much of that 500*l.* as can be proved to be remaining to the credit of B. He said: "An action may lie against the finder, it is true . . . . but not after it has been paid away in currency." That must mean that if money, notes, or cheques be transferred without consideration the transferee gets no better title than the transferor had. It is otherwise if they are transferred for valuable consideration and bona fide. That this is Lord Mansfield's meaning is clear from his reliance on the finding that the plaintiff in *Miller* v. *Race* (1) took the note "for a full and valuable consideration"; from his frequent reference to money that has "passed in currency," money taken "in the course of currency," and money taken "in the usual course of business"—phrases which he uses as equivalent to money passing for valuable consideration; and from the fact that the subject matter with which he was dealing was a bank note for which the plaintiff had given a full and valuable consideration.

That being so the appellant's case fails. There is no difficulty in following the cheques into the appellant's account with the London Joint City and Midland Bank. In point of fact it is clear that the 315*l.* is part of the proceeds of Hambrouck's fraud, and in point of law the money may be followed, notwithstanding that it has found its way into a banking account: *In re Hallett's Estate* (2); *Sinclair* v. *Brougham.* (3)

Langdon K.C. in reply.

Cur. adv. vult.

Nov. 5. The following written judgments were delivered:—

BANKES L.J. In this action the plaintiffs by their statement of claim asked for an order that the sum of 315*l.* paid into Court by the London Joint City and Midland Bank should be paid out to them.

(1) 1 Burr. 452. (2) 13 Ch. D. 696.
(3) [1914] A. C. 398.

The material facts relating to this sum of money are as follows: A M. Pelabon banked with the plaintiff Bank. The defendant Hambrouck was in M. Pelabon's employ. Hambrouck possessed himself of a number of crossed cheques drawn in his favour and purporting to be drawn by M. Pelabon's authority. These cheques Hambrouck paid into Messrs. Farrow's Bank, who collected the cheques and credited Hambrouck with the amounts. Hambrouck drew out these amounts and paid some of the money to the appellant, who in turn paid some portion of what she so received into her account at the London Joint City and Midland Bank. At the time when Hambrouck's frauds were discovered the appellant had 315*l.* standing to her credit in this account.

The action was brought against the London Joint City and Midland Bank as well as against Hambrouck and the appellant, but by an order made in the action proceedings were stayed against the Bank on their paying the 315*l.* into Court. No evidence was given in the Court below as to the exact means by which Hambrouck defrauded M. Pelabon. The statement of claim alleges that he obtained payment of the cheques by fraudulently representing that they were drawn by M. Pelabon's authority. For the purposes of my judgment I will assume that Hambrouck obtained a voidable title to the proceeds of the cheques. Whatever the position of the plaintiff Bank may have been in relation to their customer, M. Pelabon, in the event of the Bank being unable to recover the moneys which they had paid out when the cheques were presented to them for payment, it is I think clear that the moneys which were so paid out were the moneys of the plaintiff Bank which they were entitled to recover if they could. This conclusion disposes of the point raised by Mr. Warren that the action would not lie, because the Bank were, at the time of the trial, claiming that as between themselves and M. Pelabon the loss must fall upon him.

Had the claim been for the recovery of a chattel sold instead of for a sum of money alleged to be given, the appellant's counsel do not dispute that, in order to retain the chattel, the appellant must establish that she gave value for

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it without notice that it had been obtained by the vendor by fraud; but they attempt to distinguish the present case from the case of the sale of a chattel by saying: (*a*) that the appellant, who had no notice of Hambrouck's fraud, obtained a good title to the money, because it was a gift to her from Hambrouck; (*b*) that the rule applicable to a chattel has no application to currency; (*c*) that the fact that the appellant had paid the money into her banking account prevented any following of the money by the plaintiff Bank, and that an action for money had and received would therefore not lie.

In my opinion the first contention cannot be supported either upon the facts or in law. The facts show that the payments made by Hambrouck to the appellant were made without valuable consideration, and for an immoral consideration. Even if they could be appropriately described as gifts, a gift without valuable consideration would not give the appellant any title as against the plaintiff Bank.

The second contention also cannot be supported in law. It rests upon a misconception as to the meaning which has been attached to the expression "currency" in some of the decisions which have been referred to. In *Miller* v. *Race* (1) Lord Mansfield in dealing with the question whether money has an earmark says: "The true reason is upon account of the currency of it; it cannot be recovered after it has passed in currency." The learned judge is there using the expression in the same sense as that in which Channell J. uses it in *Moss* v. *Handcock* (2) where he says: "If the coin had been dealt with and transferred as current coin of the realm, as, for instance, in payment for goods purchased or in satisfaction of a debt, or bona fide changed as money for money of a different denomination." Where the word "currency" is used merely as the equivalent of coin of the realm, then for present purposes the difference between currency and a chattel personal is one of fact and not of law. This was the view of Lord Ellenborough in *Taylor* v. *Plumer* (3), in the passage in which he deals with the difficulty of tracing money

(1) 1 Burr. 452, 457; 1 Sm. L. C., 12th ed., p. 525.

(2) [1899] 2 Q. B. 111, 118.

(3) 3 M. & S. 562, 575.

which has become part of an undivided and undistinguishable mass of current money, and which in this respect differs from marked coins or money in a bag. With regard to the latter he says that the rule for the purpose we are considering in this appeal is the same as that which applies to every other description of personal property. Dealing with this point in *Sinclair* v. *Brougham* (1) Lord Haldane says: "The common law, which we are now considering, did not take cognizance of such duties. It looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it." To accept either of the two contentions with which I have been so far dealing would be to assent to the proposition that a thief who has stolen money, and who from fear of detection hands that money to a beggar whom he happens to pass, gives a title to the money to the beggar as against the true owner—a proposition which is obviously impossible of acceptance.

The last contention for the appellant cannot in my opinion be supported. The law on the subject has been so fully discussed recently in *Sinclair* v. *Brougham* (2) that I need only point out that the law as laid down by Lord Ellenborough in *Taylor* v. *Plumer* (3) as to the right of an owner to recover property in the common law Courts from a person who can show no title to it, where the property was capable of being traced, whether in its original form or in some substituted form, was fully accepted, and it was explained that the rule in equity which was applied in *Hallett's Case* (4) was only introduced to meet cases where the money sought to be traced could no longer be identified owing to its having become merged in the Bank's assets, and the relationship of debtor and creditor, between the customer who had paid the money into the Bank and the Bank into which the money had been paid, having intervened.

(1) [1914] A. C. 398, 420.
(2) [1914] A. C. 398.
(3) 3 M. & S. 562.
(4) 13 Ch. D. 696.

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The facts in the present case in my opinion remove any difficulty in the way of the plaintiff Bank recovering, without having recourse to the equity rule. The money which the Bank seeks to recover is capable of being traced, as the appellant never paid any money into the Bank except money which was part of the proceeds of Hambrouck's frauds, and the appellant's Bank have paid all the money standing to the appellant's credit into Court, where it now is. Even if it had been necessary to apply the rule in *Hallett's Case* (1) to enable the plaintiff Bank to establish their right to the money they claim, I see no difficulty in applying the rule to the facts as found by the learned judge in the Court below.

In my opinion the appeal fails and must be dismissed with costs.

SCRUTTON L.J. One Hambrouck was a clerk in the Pelabon Works, the owner of which banked with the Banque Belge. By forgery or fraud Hambrouck obtained from the Bank over 6000*l.* by means of cheques on his employers' account. He was living with a Belgian woman called Spanoghe, and from time to time paid to her money which she paid into a deposit account at her bank. Shortly after the fraud was discovered she had 315*l.* in that account. The Banque Belge sued her to recover that money; the judge below gave the Bank judgment for that amount, and she appeals against the judgment.

The ground of the decision below is that the 315*l.* is traced to the money which Hambrouck obtained by fraud from the Bank; that this money was never Hambrouck's property, and as Mlle. Spanoghe gave no legal consideration for its transfer to her, but only the immoral consideration of past or future cohabitation, she cannot acquire a title to the money as a purchaser for value without notice of any defect in the transferor's title.

The first objection taken is that the Bank are not the proper plaintiffs, as Pelabon is not now objecting to the Bank's debiting his account with the cheques. It is clear,

(1) 13 Ch. D. 696.

however, that the money actually obtained by Hambrouck was the Bank's money, even if they might debit their payments to the account of another, and the Bank therefore can sue for the money if it was obtained by fraud on them. Secondly, it was said that as Hambrouck paid the stolen money into a bank, he had only a creditor's right to be paid with any money, not the particular money he paid in; so that when he drew some money out of the bank and paid it to Mlle. Spanoghe, he did not make her the recipient of the money he had obtained from the Banque Belge, and therefore an action for money had and received would not lie. It was further said that Mlle. Spanoghe received the money as a gift without notice of any defect in title and that therefore no action would lie against her.

This last objection is, I think, bad. At common law, a man who had no title himself could give no title to another. Nemo potest dare quod non habet. To this there was an exception in the case of negotiable chattels or securities, the first of which to be recognized were money and bank notes: *Miller* v. *Race* (1); and if these were received in good faith and for valuable consideration, the transferee got property though the transferor had none. But both good faith and valuable consideration were necessary, as Lord Mansfield says (2): "in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration"; but before money has passed in currency an action may be brought for the money itself. In the present case, it is clear that this money came to Mlle. Spanoghe either as savings out of housekeeping allowance, or as a gift to a mistress for past or future cohabitation. In the first case she would hold it as agent for Hambrouck; in the second for no consideration that the law recognized. If then the money that came to her was the money of the Banque Belge, she got no title to it, as Hambrouck against the Banque Belge had no title. The defence is that it was not the money of the Banque Belge, for payment

(1) 1 Burr. 452; 1 Sm. L. C., 12th ed., p. 525. (2) 1 Burr. 457.

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into Hambrouck's bank, and his drawing out other money in satisfaction, had changed its identity.

I am inclined to think that at common law this would be a good answer to a claim for money had and received, at any rate if the money was mixed in Hambrouck's bank with other money. But it is clear that the equitable extension of the doctrine as based on *In re Hallett's Estate* (1) and explained in *Sinclair* v. *Brougham* (2) enables money though changed in character to be recovered, if it can be traced. As Lord Parker says in the latter case (3) on equitable principles, the original owner would be entitled "to follow the money as long as it or any property acquired by its means could be identified." In that case there was an equitable charge on the substituted fund or property, if it could be traced to the stolen money. As Bramwell J.A. puts it in *Ex parte Cooke* (4): "A difficulty in tracing money often arises from the circumstance that payments now are not usually made in gold, but by cheques which go into a banking account, so that the sum is mixed up with the other moneys of the customer. But if this payment were made by a bag of gold which the broker put into his strong box, and then misapplied part of the money, leaving the rest in the bag, there would be no doubt that what was so left could be claimed as the money of the client. The use of cheques may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the client, appears to me to be covered both by the reason of the thing and by the authority of *Taylor* v. *Plumer*." (5) If that is the test to apply it is clear that the 315*l.* in Mlle. Spanoghe's account and now in Court, can all clearly be traced to the money obtained by Hambrouck by fraud or forgery from the Bank, and as she gave for it no valuable consideration, she cannot set up a title derived from Hambrouck, who had no title against the true owner.

For these reasons, in my opinion the appeal fails, and should be dismissed with costs.

(1) 13 Ch. D. 696.
(2) [1914] A. C. 398.
(3) [1914] A. C. 447.
(4) (1876) 4 Ch. D. 123, 128.
(5) 3 M. & S. 562.

ATKIN L.J. The facts in this case appear to be as follows. A M. Pelabon, trading as the Pelabon Works, in 1917 and onwards employed as a clerk in the cashier's department a man named Hambrouck. During his employment between June 5, 1917, and August 31, 1919, Hambrouck obtained from the plaintiff Bank, the bankers of the Pelabon Works, the sum of 6680*l.* 13*s.* 6*d.* by means of cheques purporting to be drawn per pro. the Pelabon Works, but in fact without the authority of that firm. The cheques material to this action were drawn in favour of Hambrouck himself to his order, and as Hambrouck used the firm's form of cheque which had a printed crossing on them, the cheques were crossed. They therefore had to pass through a bank. Hambrouck accordingly opened an account with Farrow's Bank, Richmond Branch, and having indorsed the cheques paid them into his account. Farrow's Bank cleared through the then London and South Western Bank now merged in Barclays Bank, through whom the amount of these cheques was collected from the plaintiff Bank and the proceeds were placed to Hambrouck's credit. In substance no other funds were paid into the account than the proceeds of these forged cheques. I call them forged because Hambrouck being indicted for forging them pleaded guilty and has been sentenced for forgery. As between M. Pelabon and the plaintiff Bank there has been a dispute whether Hambrouck had ostensible authority, which has been resolved since action brought by M. Pelabon withdrawing his claim as against the Bank. This seems to me not to affect the right of the parties, as will hereafter appear. Hambrouck during this time was living with the defendant Spanoghe as his mistress. He made her a monthly allowance for housekeeping, and in addition gave her sums of money. In particular the defendant during the time she lived with Hambrouck received from him in notes at various dates the sum of 465*l.* It seems immaterial whether part of that sum was or was not her savings from the housekeeping money. If it were, presumably Hambrouck acquiesced in her keeping it, and the learned judge has found, and it is impossible to dispute his finding, that all these sums

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were given to the defendant as the consideration for the continuance of illicit cohabitation. The sums in question all came from Hambrouck's banking account; they were paid by the defendant into a deposit account which she opened at the Twickenham Branch of the defendant Bank, the London Joint City and Midland Bank. No other sums were at any time placed to that deposit account. 150*l.* was drawn out by the defendant for the purpose of Hambrouck's defence. The balance, 315*l.*, is the subject of the present action. It is claimed by the plaintiffs; the defendant Bank under an order of the Court dated October 7, 1919, have paid the amount into Court; and the action has been discontinued against them, and proceeded against the other defendants.

The money was obtained from the plaintiff Bank by the fraud of Hambrouck. It does not appear to be necessary for this case to determine whether Hambrouck stole the money or obtained it by false pretences. At present it appears to me that the plaintiff Bank intended to pass the property in and the possession of the cash which under the operations of the clearing house they must be taken to have paid to the collecting bank. I will assume therefore that this is a case not of a void but of a voidable transaction by which Hambrouck obtained a title to the money until the plaintiffs elected to avoid his title, which they did when they made their claim in this action. The title would then revest in the plaintiffs subject to any title acquired in the meantime by any transferee for value without notice of the fraud.

The appellant however contends that the plaintiffs cannot assert their title to the sum of money which was on a deposit account: 1. because it has passed through one if not two bank accounts and therefore cannot be identified as the plaintiffs' money; 2. because in any case a transfer to an innocent donee defeats the original owner's claim. The course of the proceedings in this case is not quite clear. The statement of claim alleges specifically that the money is the property of the plaintiffs which they are entitled to follow, and the relief asked is not for a money judgment against the defendants, but an order that the sum paid into Court by the

defendant Bank should be paid out to the plaintiffs. In giving judgment however, the learned judge has treated the claim as one for money had and received, and the judgment entered is an ordinary judgment against the appellant on a money claim for 315*l.* together with an order that the sum in Court should be paid out to the plaintiffs in part satisfaction. The two forms of relief are different, and though in this case there is no substantial difference in the result, the grounds upon which relief is based might have been material.

First, does it make any difference to the plaintiffs' rights that their money was paid into Farrow's Bank, and that the money representing it drawn out by Hambrouck was paid to the defendant Bank on deposit? If the question be the right of the plaintiffs in equity to follow their property, I apprehend that no difficulty arises. The case of *In re Hallett's Estate* (1) makes it plain that the Court will investigate a banking account into which another person's money has been wrongfully paid, and will impute all drawings out of the account in the first instance to the wrongdoer's own moneys, leaving the plaintiff's money intact so far as it remains in the account at all. There can be no difficulty in this case in following every change of form of the money in question, whether in the hands of Hambrouck or of the appellant, and it appears to me that the plaintiffs were, on the grounds alleged in the statement of claim, entitled to a specific order for the return of the money in question, and, as it is now represented by the sum in Court, to payment out of Court of that sum.

The question whether they are entitled to a common law judgment for money had and received may involve other considerations. I am not without further consideration prepared to say that every person who can in equity establish a right to have his money or the proceeds of his property restored to him, can, as an alternative, bring an action against the person who has been in possession of such money or proceeds for money had and received; still less that he can always bring trover or detinue. But the common law rights

(1) 13 Ch. D. 696.

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are large and are admirably stated in *Taylor* v. *Plumer* (1), which was a case stated for the opinion of the Court of King's Bench after trial before Lord Ellenborough at the London Sittings. The facts are significant. Sir Thomas Plumer wishing to invest in exchequer bills gave his broker, Walsh, a draft on his bankers for 22,200*l.* to be invested accordingly. Walsh cashed the draft, receiving bank notes. He bought 6500*l.* exchequer bills. With the balance he bought certain American securities, paying for them with the actual notes received from the bank. But he gave one of the notes to his brother-in-law, from whom he received a draft on the brother-in-law's bankers for 500*l.* With this draft he bought bullion—namely 71½ doubloons—intending to abscond to North America via Lisbon. Sir Thomas Plumer's attorney overtook Walsh at Falmouth, and secured from him a return of the American securities and the bullion. Walsh, who was afterwards indicted, tried, found guilty subject to the opinion of the judges and pardoned without judgment having been passed, was made bankrupt on an act of bankruptcy alleged to have been committed before he returned the property. His assignees in bankruptcy brought trover against Sir Thomas Plumer. It was held by Lord Ellenborough delivering the judgment of the Court that the defendant was entitled to succeed, for he had repossessed himself of that of which he never ceased to be the lawful proprietor. "The plaintiff," he says, ". . . . is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law—viz., that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property. . . . It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman* (2),

(1) 3 M. & S. 562, 574.

(2) (1743) Willes, 400.

or into other merchandise, as in *Whitecomb* v. *Jacob* (1), for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." I notice that in *Sinclair* v. *Brougham* (2) Lord Haldane L.C. in dealing with this decision says: "Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received," and proceeds to say "you can, even at law, follow, but only so long as the relation of debtor and creditor has not superseded the right in rem." The words above "as for instance" et seq. do not represent and doubtless do not purport to represent Lord Ellenborough's actual words; and I venture to doubt whether the common law ever so restricted the right as to hold that the money became incapable of being traced, merely because paid into the broker's general account with his banker. The question always was, Had the means of ascertainment failed? But if in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books: *In re Hallett's Estate.* (3) I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings. If, following the principles laid down in *In re Hallett's Estate* (3), it can be ascertained either that the money in the bank, or the commodity which it has bought, is "the product of, or substitute for, the original thing," then it still follows "the nature of the thing itself." On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and

(1) (1711) 1 Salk. 160. (2) [1914] A. C. 398, 419.
(3) 13 Ch. D. 696.

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received. In the present case less difficulty than usual is experienced in tracing the descent of the money, for substantially no other money has ever been mixed with the proceeds of the fraud. Under the order of the Court in this case I think the money paid into Court must be treated as paid in on behalf of the defendant Spanoghe, and the money judgment, together with the order for payment out to the plaintiffs, effectually secures their rights.

Secondly, so far as it is contended that the bankers are entitled to retain possession where they have not given value, I think that has been concluded by what I have already said as to valuable consideration.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Appleton & Co.*

Solicitors for respondent: *Michael Abrahams, Sons & Co.*

W. H. G.

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SUTHERLAND AND COMPANY *v.* HANNEVIG BROTHERS, LIMITED.

Arbitration—Practice—Power of Arbitrator to correct Award—"Error arising from any accidental slip or omission"—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 7 (*c*).

By his award an arbitrator awarded certain costs to one of the disputants. The successful party, being uncertain whether this award included the whole or only a part of the costs, wrote to the arbitrator. The arbitrator stated that "he certainly had made an error in writing his award, and had amended his award so that it should read as he originally intended to state it," and issued another award in which he made it clear by the addition of several words that the larger amount was included in the award:—

Held, that the arbitrator had not made an "error arising from any accidental slip or omission," within the meaning of s. 7 (*c*) of the Arbitration Act, 1889, and that he could not correct his award under the powers conferred by that section, inasmuch as what he had done was to assume jurisdiction to expound his award.

MOTION to set aside an award.

By a charterparty dated April 30, 1917, made between

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Sutherland & Co. (called herein "the respondents") and the owners, the owners chartered the steamship *Steady* (renamed the *Oistein*) to the respondents. On May 4, 1917, the respondents rechartered the *Steady* to Hannevig Bros., Ld. (called herein "the applicants") on terms and conditions identical with those contained in the charterparty of April 30. At the termination of the charterparties questions arose with regard to the balance of hire and of insurance premiums. The owners claimed against the respondents, and the respondents claimed over against the applicants. Both disputes were referred to arbitration. In that between the respondents and the applicants the arbitrators disagreed, and the umpire on December 9, 1919, awarded that the applicants should pay certain sums in respect of hire and of insurance premiums. He further proceeded: "I further find and award that the costs of this arbitration . . . . and taxed costs, as well as costs of the arbitration between the owners and [the respondents] on the same subject . . . . shall be paid by [the applicants]." As it was not clear to the solicitors for the respondents, after correspondence with the applicants' solicitors, what the costs payable by the applicants were, they wrote to the umpire on May 20, 1920, as follows: "Dear Sir,—On perusing the award in this matter we are under the impression that a clerical mistake or error arising from an accidental slip or omission has been made in the award. The award gives to our clients, Sutherland & Co., the costs of the arbitration between the owners of the *Steady* and Sutherland & Co., and what we are anxious to understand is as to whether that was intended to cover the costs which Sutherland & Co. have to pay to the owners, and Sutherland & Co.'s own costs of that arbitration as well as the arbitrator's fees. For your guidance we enclose herewith the original award, and shall be glad to hear from you on the point." A member of the firm of the respondents' solicitors saw the umpire some days later, who informed him, as appeared by the solicitor's affidavit, "that he certainly had made an error in writing his award, and had amended his award so that it should read as he originally intended to state it." He accordingly delivered

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an amended award which, so far as material, was as follows (the added words being in italics in this report): "I further find and award that the costs of this arbitration . . . . and taxed costs, as well as costs of the arbitration *and the taxed costs of the owners against* [*the respondents*], *and* [*the respondents'*] *own costs of the arbitration* between the owners and [the respondents] on the same subject . . . . shall be paid by [the applicants]."

The applicants refused to pay the costs referred to in the italicized words on the ground that they had not been parties to the arbitration between the owners and the respondents, and also contended that the umpire had no power to alter his award.

Leck K.C. and *Hildesley* for the applicants. The arbitrator having made his award was functus officio and had no power to alter it. Under the old law it is clear that he would not have been able to do so: *Mordue* v. *Palmer*. (1) But it is suggested that he had power to correct his award under s. 7 (*c*) of the Arbitration Act, 1889, which enacts: "The arbitrators or umpire acting under a submission shall . . . . have power . . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission." It seems quite clear that what the arbitrator corrected cannot be called a clerical mistake; if anything it must be an "error arising from [an] accidental slip or omission." But this was not an error of that kind. The arbitrator in his original award used words, chosen by himself, which he intended to use and which he thought carried out his meaning. He now says that they do not, but that does not show that he made an accidental slip or omission. If the arbitrator cannot correct the award under s. 7 (*c*) he cannot correct it at all, for he has not that inherent jurisdiction which a Court possesses of altering a judgment or order so as to make it conform to what the Court really meant, as was done, for instance, in *In re Rudd* (2) and *In re Swire*. (3) In *Ainsworth* v. *Wilding* (4) the Court

(1) (1870) L. R. 6 Ch. 22.
(2) (1887) W. N. 251.
(3) (1885) 30 Ch. D. 239.
(4) [1896] 1 Ch. 673.

refused to amend a judgment by consent, although consented to by mistake, where it contained the very words consented to.

Le Quesne for the respondents. The arbitrator had power to correct this award, as there was an error in it arising from the accidental omission of the words he has added, within the meaning of s. 7 (*c*) of the Arbitration Act, 1889. Before the passing of that Act there had been a line of decisions which made it impossible for an arbitrator to correct any slip or omission in his award without bringing it before a Court and having it sent back to him by them, and it was to avoid this that s. 7 (*c*) was enacted, it being recognized that an arbitrator combines in his person the functions of judge and recording officer. Therefore, also, the powers conferred on him by s. 7 (*c*) are the same as those conferred on the Court by Order XXVIII., r. 11, of the Rules of the Supreme Court, and decisions on that rule are in point. In *Doswell* v. *Norton* (1) Bucknill J., acting under the above rule, altered a judgment he had given so as to make it conform to the judgment he would have given had his attention been drawn to a county court rule. In *Shipwright* v. *Clements* (2) a judgment granting an injunction "perpetually to restrain" the defendant was altered so as to limit the operation of the injunction "during the remainder of the term of the lease."

[*Oxley* v. *Link* (3) was also cited.]

It is admitted that this power of correction is not unlimited, but it exists whenever the award does not represent what the arbitrator intended, unless, of course, the rights of third parties have intervened. Here the arbitrator omitted to add words, and although it may be true that if left to himself he would not have noticed the omission, he is entitled to say, "If my attention had been drawn to what I was writing I should have written something different." It seems clear that he originally intended to do what he has now done, and the Court, if not satisfied as to this, should remit the case to him for information on that point.

Leck K.C. replied.

(1) (1902) 18 Times L. R. 228. (2) (1890) 63 L. T. 160.
(3) [1914] 2 K. B. 734.

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ROWLATT J. In this case a point has arisen relating to the extent of the powers conferred upon arbitrators under s. 7 (*c*) of the Arbitration Act, 1889. It is an extremely difficult point, and it is an extremely important one. The section reads as follows: "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission." Upon the construction of those words it seems quite obvious as a matter of grammar that "clerical" belongs to "mistake" only, and that "error arising from any accidental slip or omission" is a second and independent limb of the clause.

The words of the clause are similar to those in Order XXVIII., r. 11, and in my judgment most of the difficulty has been caused by the extent of the meaning given to the words in that Order. I cannot help feeling that, as applied to arbitrators, the words ought to be construed fairly strictly. Before the Arbitration Act was passed it is clear that the Courts regarded it as very dangerous to allow arbitrators to touch their awards after they had been made, and *Mordue* v. *Palmer* (1) is the well-known case upon the subject. In that case the error corrected by the arbitrator arose from the mistake of a clerk in copying the draft award, and it was held that the arbitrator could not put the mistake right being functus officio. Such a state of things as that has clearly been altered by s. 7 (*c*), but the difficulty is to see how far the alteration has gone.

In the present case the arbitrator made an award including therein certain costs between one of the parties and a third party, and the question arose whether the words he had used included all those costs or only some of them. The award went back to him, and he told Mr. Lewis, of the firm of solicitors representing the respondents, that he certainly had made an error in writing his award, and he amended it so that it read, as he said, as he had originally intended it to read.

Now that was not the correcting of a clerical mistake within

(1) L. R. 6 Ch. 22.

the meaning of s. 7 (*c*), which is something almost mechanical —a slip of the pen or something of that kind. But did he correct an error arising from an accidental slip or omission? Here we get upon ground which is almost metaphysical. An accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident. What is an accident in this connection, an accident affecting the expression of a man's thought? It is a very difficult thing to define, but I am of opinion that this was not an accident within the meaning of the clause.

I cannot pretend to give a formula which will cover every case, but in this case there was nothing omitted by accident: the arbitrator wrote down exactly what he intended to write down, though it is doubtful what that really meant when considered from a legal point of view. But what the arbitrator has really done here is to assume a jurisdiction to expound what he had purposely written down, and that, I think, he cannot do. Mr. Le Quesne for the respondents contended that it was by inadvertence that the arbitrator did not put down all he meant to put down. I do not think that inadvertence is the right word. A man may inadvertently put down a word which if he had thought more about the matter he would have put down differently, but that means that he has merely gone wrong. I think that in substance the arbitrator took upon himself to insert an exposition of his words, because he found the words he had used not so well chosen as they might have been if chosen deliberately. The motion must be allowed and the award set aside.

McCardie J. I agree that this appeal raises a question of difficulty and importance, and my mind has fluctuated a good deal in the course of the argument. The question arises out of the charter of a ship called the *Steady* to Sutherland & Co., the respondents, who rechartered it to the applicants on the same terms. Differences arose between the parties, and as a result two distinct arbitrations were held, one between the owners and the respondents and the other between the

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respondents and the applicants. In the latter the arbitrator made an award, in which he said that "the costs of this arbitration . . . . as well as costs of the arbitration between the owners and Sutherland & Co. on the same subject . . . . shall be paid by Hannevig & Co." Upon that a question arose as to the meaning of "costs of the arbitration between the owners and Sutherland & Co.," whether that included the costs which Sutherland & Co. had to pay the owners in the first arbitration. The correspondence which has been read took place between Sutherland & Co. and the arbitrator, as a result of which the arbitrator delivered an amended award, stating that he had "made an error in writing his award, and had amended his award so that it should read as he originally intended to state it." The clause, as amended, ran: "The costs of this arbitration . . . . as well as costs of the arbitration *and the taxed costs of the owners against Sutherland & Co., and Sutherland & Co.'s own costs of the arbitration* between the owners and Sutherland & Co. on the same subject . . . . shall be paid by Hannevig & Co." This alteration was a serious matter, and it clearly involves a serious point of law as to the power of the arbitrator to make it. Under the old law it is quite clear that he could not have made it, for the law was most rigorous as to the limitation of an arbitrator's powers, and from the moment he put forward a paper as his award he was functus officio, and could not put right any mistake at all; any alteration was nugatory and the old award stood: *Henfree* v. *Bromley*. (1) The question is how far the law has been altered by s. 7 (*c*) of the Arbitration Act, 1889, which gives an arbitrator power "to correct in an award any clerical mistake or error arising from any accidental slip or omission." I think that the word "accidental" in clause (*c*) applies both to "slip" and to "omission." The sub-clause is taken direct from Order XXVIII., r. 11, and decisions under that rule are in point in so far as they are decisions on the rule and not, as many of them are, decisions based rather on the inherent jurisdiction of the Court than on the rule.

(1) (1805) 6 East, 309.

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In *Inland Revenue Commissioners* v. *Hunter* (1) Scrutton J. said that "a referee, having once issued his award, cannot issue another without the consent of both parties." In saying that I do not think the learned judge could have had present to his mind s. 7 (*c*) of the Arbitration Act. In *Oxley* v. *Link* (2) the Court of Appeal imposed a most stringent rule. In an action against a married woman sued in respect of her separate estate, judgment was by mistake drawn up in the ordinary form against the defendant personally, instead of in the form settled by the Court of Appeal in *Scott* v. *Morley*. (3) The Court held that the plaintiffs were not wanting to correct a slip, but were seeking to substitute one form of judgment for another, and that consequently Order XXVIII., r. 11, did not apply.

In the present case the arbitrator clearly did not make a clerical error, and the question is did he make an accidental slip? I do not think he did. He seems to have put down precisely what he meant to put down, and he did not put in anything that he did not intend to put in, nor did he omit anything that he intended to put in. I do not think, therefore, that the arbitrator was, under s. 7 (*c*), entitled to do what he did. I may add that in my opinion the Court in *Doswell* v. *Norton* (4) took a very liberal view in interpreting Order XXVIII., r. 11, and I think it is very doubtful whether that case should be followed. I agree that the motion should be allowed and the award set aside.

Award set aside.

Solicitors for applicants: *Roney & Co.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis.*

(1) [1914] 3 K. B. 423, 428.
(2) [1914] 2 K. B. 734.
(3) (1887) 20 Q. B. D. 120.
(4) 18 Times L. R. 228.

W. L. L. B.

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Nov. 15.

[BANKRUPTCY.]

In re LAVEY.

Ex parte COHEN AND COHEN.

Bankruptcy—Trustee's Costs—Taxation—Solicitor and Client Costs—Fees to Counsel—Copies of Documents required by Counsel—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 56, *sub-s.* 9 ; *s.* 83, *sub-s.* 3—*R. S. C.*, 1883, *Order* LXV., *r.* 27, *sub-r.* 29.

Where a trustee in bankruptcy with the sanction of the committee of inspection employs a solicitor to do particular business, the principle on which the solicitor's bill of costs against the trustee is to be taxed is that of solicitor and client, not as between solicitor and own client but that of "where the client and others are interested in a common fund," i.e., the bankrupt's estate, and on such a taxation the taxing Master is not bound to allow copies of documents supplied to counsel at his request, nor the whole amount of the fees paid to counsel on the written authority of the trustee. But where the trustee has honestly sanctioned an expenditure which is not excessive, the taxing Master should take a liberal view as far as possible in allowing the amounts against the estate which have honestly been incurred on behalf of such trustee.

In this case the committee of inspection sanctioned the employment of Messrs. Cohen & Cohen as solicitors of the trustee to take certain proceedings against Mrs. Lavey, the bankrupt's wife, and against a Mr. Sunderland, but did not limit the amount of costs. In each case, on the motion coming on for hearing, the respondent submitted to an order with costs and a considerable sum was obtained for the estate. The costs were taxed against each respondent as between party and party. Subsequently, Messrs. Cohen & Cohen carried in their bill of costs against the trustee from May, 1917, to December, 1919, for taxation, and the taxing Master in bankruptcy taxed the bill as between solicitor and client and on the footing of Order LXV., r. 27, sub-r. 29, and the taxing Master, in Mrs. Lavey's case, reduced by one-half the charge for "Instructions for Brief," and wholly disallowed the charge for copies of the bankrupt's examination under s. 25 and copies of the examination of Mrs. Lavey and of another person. In Sunderland's case a similar reduction was made

in "Instructions for Brief" and the copy examination of the bankrupt was disallowed.

The solicitors carried in objections (inter alia) to these disallowances, which were numbered 2, 4 and 5, as follows :—

2. The objection to the Master's taxation in respect of these items is the same. The Master has indicated that he has reduced the fee for "Instructions for Brief" notwithstanding the importance and difficulty of this case (Mrs. Lavey's), the large amount involved and the successful results enabling close on 1000*l.* to be obtained for the estate by the work in question, because he thought that out of 600 folios mentioned as having been perused only some 300 folios were material, and he has disallowed from the copies some 273 folios. In the first place, even if the Master were correct in disallowing the copies in question it cannot be contended that the solicitors would not have had the work to do in perusing these examinations for the purpose of picking out all material points and salient features attention to which was calculated to assist the claim being brought to a successful result, but in addition it is submitted that the Master is wrong in principle in disallowing these copies for counsel. This is a taxation as between solicitor and client out of a fund and none of these copies were sent to counsel from over-caution, negligence or mistake and therefore should be allowed. The Master's attention is called to copy of the letter marked A attached hereto. [This was a letter from the clerk to the leading counsel which stated in effect that in both cases counsel required to be supplied with copies of the examinations in question.] Although only certain questions in these documents appear to relate to the furniture the subject of this motion (Mrs. Lavey's) the learned Master has overlooked the fact that the respondent could not possibly have succeeded in her claim to this furniture unless she had called the bankrupt to corroborate her story as to the transaction between her husband and herself. The credibility of the bankrupt was therefore involved most materially . . . . and his examinations were most important for the purposes of cross-examination. . . . . The Master has perhaps not

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unnaturally been unable to appreciate the bearing of these matters on the issue involved and on the cross-examination which would have been necessary had witnesses been called in support of the respondent's story. It was therefore most essential that counsel should have all this matter for the purposes of cross-examination. These copies should therefore be allowed, and upon their being allowed the amount for "Instructions for Brief" will automatically be increased in accordance with the Master's own decision as to the ground upon which he has at present reduced the same.

4. The objection to the Master's taxation in respect of these items is identical. The Master has indicated that he has reduced the fee for "Instructions for Brief" notwithstanding the importance and difficulty of this case (*Sunderland's Case*) and the large amount involved and the successful result, because he thought that out of 1400 folios or thereabout laid before counsel he has allowed as he points out less than half. If therefore this disallowance for documents is incorrect the amount for "Instructions for Brief" would automatically be increased. The Master has however acted on a wrong principle in disallowing these copies for counsel. [The attention of the Master was then directed to the copy of the letter marked A above referred to.] . . . . These copies therefore should be allowed as against the trustee who moreover has approved the bill. Whether the taxation was under either of the three forms applicable between solicitor and client these items should be allowed. If under form No. 1, because they have been approved by the party to be charged. If under form No. 2, because they cannot be said to have been incurred through over-caution, negligence or mistake; and if under form No. 3, because they are in fact relevant.

5. With regard to these two items (deductions from the fees allowed to counsel), as the Master has pointed out, a most important point of principle is involved and one which he desires to have settled—namely, whether he is bound to allow the fees authorized by the trustee to be paid to counsel on a taxation of the costs as between the solicitors for the trustee and the trustee. In this instance, as the learned Master is

aware, the fees to be paid to counsel were authorized by the trustee beforehand and the taxing Master has before him the trustee's authority to these fees required by the learned counsel copy whereof is attached hereto marked B. [The trustee's letter of authority was set out.] It is submitted that a taxation against the trustee in bankruptcy is one under the first of the forms adopted in taxation as between solicitor and client, and therefore it is one in which all fees must be allowed against the party who has incurred the same. The submission on this point is that the trustee in bankruptcy is the representative of the creditors appointed by them and the taxation therefore is one against the creditors themselves. The items in question being approved and authorized by the trustee must therefore be allowed as against him. The matters in question relate to steps taken to increase the funds divisible among the creditors. The creditors appoint the trustee as their representative, and the maxim therefore Qui facit per alium facit per se applies. The authority of the trustee is really the authority of the creditors. By the authority of the committee of inspection, formed among the creditors themselves, the trustee is authorized to employ solicitors and the trustee has power himself to authorize the fees to be paid to counsel by the solicitors. If such fees could be disallowed, the position of the solicitors to the trustee in bankruptcy would be a dangerous one. If contrary to the above contention it be held that a taxation as between the trustee and his solicitors does not fall under form No. 1 but under form No. 2, then it is submitted that these fees would still be properly allowed, because they are not "special" fees but ordinary fees, and in fact very moderate ones. Shortly the principle involved is: (*a*) whether the taxation is in fact one against the creditors themselves, (*b*) if not, whether the fees are "special" or not.

The Master's answers were as follows:—

2. Generally speaking I consider that in preparing a case for a motion in bankruptcy or an action in the High Court all such costs, etc., as appear to be necessary for the attainment of justice, etc., ought to be allowed under Order LXV., r. 27,

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sub-r. 29, and this standard ought to be applied (in my opinion) to a solicitor and client bill of costs as well as to a party and party with certain modifications. I maintain that the taxation in this case is one between solicitor and client "when the costs are payable out of a general or common fund" and *not* as between solicitor and (own) client, and therefore they ought not to be allowed on such a generous footing as if they were chargeable to the solicitor's own client. The qualification in sub-r. 29—"but save as against the party who incurred the same"—does not in my opinion apply to the case of a trustee in bankruptcy who has not incurred the costs on his personal responsibility but as representing "the general or common fund" (i.e., the bankrupt's estate) with the sanction of the committee of inspection. If therefore my construction of this sub-r. 29 and its saving clause is correct, I consider that I am entitled to hold that, as a good many items of costs were incurred through overcaution and mistaken ideas as to relevancy, etc., and higher fees paid to counsel in consequence and were disallowed as against the losing party in the motion, the same standard ought to be applied when I come to tax the solicitor's bill of costs when payable out of the estate, this of course only refers to such matters as copies of documents, fees to counsel, etc. . . . . but I maintain that when on taxation against a losing party nearly half of the documents charged as being relevant to the motion are disallowed, I am justified in penalising the solicitors to the same extent when taxing their bill of costs chargeable to the bankrupt's estate, and I do not agree with the argument raised to their objections that "although only certain questions in these documents appear to relate to the furniture the subject matter of this motion" they ought to be allowed, because the credibility of the bankrupt was involved.

4. As to the extract from (counsel's letter to the trustee) I may say that in addition to its being rather irregular to have counsel's opinion about matters relating to his own fees, etc., produced on taxation, I am not informed with his views as to the materiality of the documents and correspondence on which his fees partly depend nor his views as to the propriety

of such fees (for the same reason), seeing that his opinion can scarcely be described as an unprejudiced one. As to the correspondence and copy of the examination of Lavey (the bankrupt) I may say that I went through every word of both these sets of documents, and using my discretion to the best of my ability considered that they ought not to be allowed either in the party and party bill or in that of the solicitor and client. . . . . As to the "Instructions for Brief" it will be noted that five guineas more were allowed to the solicitor and client bill than to the party and party bill, and five guineas more on counsel's fees in addition to which the fees charged in the bill for consultation were allowed to be increased.

5. As already pointed out five guineas and three guineas have been allowed to counsel in the solicitor's and client bill over and above those allowed to the party and party bill, but I do not admit that I am bound by any instructions given by the trustee to the solicitors as to the amount of fees to be paid to counsel, as I do not consider that the trustee is, strictly speaking, "the party who incurred the same," but as I said in my answer to objection he represents the common fund (the bankrupt's estate), incurs no personal responsibility for costs and can only act with the sanction of the committee of inspection. Even if the trustee did authorize the particular fees there was nothing to show that the committee of inspection were consulted in the matter and sanctioned them as required by s. 56, sub-s. 3, of the Bankruptcy Act, 1914. Again, even if the fees in question are not "special fees" in a technical sense, I consider that I have a discretion over counsel's fees as in other matters of discretion and I have exercised it.

The solicitors appealed against the taxing Master's decision, and on the motion coming before the Court on July 27 last, Horridge J. directed the motion to stand over in order that the Board of Trade might be represented.

Nov. 15. The motion now came on again.

E. W. Hansell for the solicitors. The question is, first, whether the solicitor of the trustee in bankruptcy is entitled

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to have his bill of costs taxed on the principle of solicitor and (own) client, or only on the principle of solicitor and client. There is no direct authority on the point. In *Giles* v. *Randall* (1) Buckley L.J. states the three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. If the principle in the present case is not that of solicitor and own client, it is submitted that the second mode of taxation applies—i.e., where the costs are to be paid out of a common fund in which the client and others are interested, and that the exception in sub-r. 29 of r. 27 of Order LXV. does not apply. Here the trustee authorized certain fees to be paid to leading counsel and junior counsel and they were paid, and the taxing Master has disallowed five guineas in the one case and the usual proportion in the other. The relevant statutory provisions are sub-ss. 3 and 9 of s. 56 of the Bankruptcy Act, 1914, which empowers the trustee with the permission of the committee of inspection to employ a solicitor to take any proceedings but the permission must be to do the particular things for which the permission is sought, and then sub-s. 3 of s. 83 of the Act directs the taxing officer to satisfy himself before passing the solicitor's bill of costs that the employment of the solicitor was duly sanctioned, and there is the general regulation as to the scale of costs set out in Williams on Bankruptcy, 11th ed., p. 685. There is no question here that the solicitors had the proper authority from the committee of inspection in each case and that the trustee authorized the fees when the matter was placed before him. The committee of inspection here did not limit the amount of the costs, although they had power to do so. It is submitted that the position of a solicitor to the trustee is exactly the same as that of a

(1) [1915] 1 K. B. 290, 295.

solicitor to any other client as between himself and his client. The fund out of which the costs are paid—namely, the bankrupt's estate—is a fund which belongs to the trustee, collected by him as representing the general body of creditors, and the rule provides the order in which the various charges and payments are to be made, but the fund belongs to the creditors and the trustee as a body. He has no doubt an individual interest, because his remuneration will come out of the fund, but the fund is collected as money divisible among the creditors, and it is a fund of which the trustee by virtue of his office as representing the creditors is the owner. There is no difference between that case and the case of any other client who has got money and has employed a solicitor. The only cases decided under s. 56 are *In re Duncan* (1) and *In re Vavasour* (2) but they have little bearing on the present case. The trustee is an officer of the Court and therefore ought to be indemnified and protected against consequences. The committee can limit the costs but they are not bound to do so.

If the principle in the present case is not that of solicitor and own client, it is submitted that the second mode of taxation applies—i.e., where the costs are to be paid out of a common fund in which the client and others are interested, and that the exception in sub-r. 29 of r. 27 of Order LXV. does not apply. Here the counsel's fees were authorized by the trustee and are not unusual or extraordinary and ought to have been allowed unless they were within the prohibition of the rule. Then as to items 2 and 4, they were documents which counsel required to get up the case for the cross-examination of the respondents if they had gone into the witness box and they ought to be allowed.

Austen-Cartmell for the Board of Trade. It is submitted that the taxation here ought to be as between solicitor and client and not as between solicitor and own client, and that matters of quantum and so forth are solely for the discretion of the taxing Master. In a sense the client no doubt is the trustee in bankruptcy but he is not, so far as his fund is

(1) [1892] 1 Q. B. 879. (2) [1900] 2 Q. B. 309.

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concerned, an individual client. He is holding as an officer of the Court the administration of a fund which does not belong to him beneficially. The fund is the bankrupt's estate which he has to administer under the Act of Parliament, and the taxation must be really in accordance with the taxation of a trustee who is no doubt as regards the solicitor personally a client. But if he wants to get indemnified out of his trust fund he has to show that the charges he seeks to have allowed against the estate are proper charges. It is not for him to say according to his ipse dixit that such and such charges are proper. It is for the taxing Master to say, subject to the review of the Court, what are proper charges. It cannot be right as a matter of principle that it should be in the hands of a trustee in bankruptcy to say as between himself and his solicitor that such charges as they shall agree should be paid.

E. W. Hansell in reply.

HORRIDGE J. This is an application to review a taxation of costs which raises a question of some difficulty and of very considerable importance, because my ruling on this matter will govern the taxation in future of trustees' bills of costs against their estate, so far as it involves similar questions to those raised in this application. The matters complained of are that the taxing Master has disallowed a portion of the fees actually paid to counsel by the solicitor on the instruction of the trustee, and the furnishing of copies of certain documents required by counsel to get up the case, and certain consequential costs such as "Instructions for Brief" which followed the disallowance of those copies of documents.

The principle upon which bills of costs as between solicitor and client as distinguished from party and party are to be taxed was raised in *Giles* v. *Randall.* (1) It appears that a recognized practice has sprung up of different forms of taxation as between solicitor and client, although, if I may say so with great respect, I entirely agree with Pickford L.J. when he says: "According to the practice of taxation which

(1) [1915] 1 K. B. 290, 295, 298.

has grown up upon, so far as I can see, no intelligible principle." That practice is summarised in the judgment of Buckley L.J. where he says: "There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. . . . . The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest." Now it seems to me quite clear that this case does not come within the third. I have therefore to consider whether it comes within the first or second class of case. In order to decide that question it is necessary to consider what the position is of a trustee in bankruptcy in his relations to the solicitor who is appointed to conduct the litigation. In my view the solicitor knows what the position is, because everybody is presumed to know the position which is defined by the law. If the true view is that the trustee is not entitled beforehand to fix the costs so as to bind the taxing Master, the solicitor must be taken to know that and to take the business knowing the position created by the law as regards the trustee and his estate. Therefore there is no question here of the trustee being made to do what is right or of the Court protecting its officer, because the trustee and the solicitor must be taken to know the circumstances under which they embark upon the matter and the rights which the trustee has against the fund. It has been urged before me that if the trustee acts bona fide he is entitled to get out of the estate any sum which he authorizes to be paid to counsel and any costs which he authorizes bona fide to be incurred. Now what is the position as regards the trust fund? The trustee is himself interested in that fund. He is interested in his capacity as trustee and he is interested in his capacity personally in respect of his own remuneration and the costs and charges which he may have to get paid out of the fund. The creditors as a body are also interested in that fund, and therefore this case seems to me to clearly

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come within the class where the client and others are interested in the common fund, and therefore to be within the second class mentioned by Buckley L.J. It clearly is not a case where the client is taxing his own solicitor's bill of costs as between solicitor and own client, where such costs are payable out of a fund belonging exclusively to the party himself. This fund does not belong exclusively to the trustee, but is a fund in which the trustee and the creditors are jointly interested. Therefore it comes within the second class and the trustee is not entitled to a complete indemnity in the sense in which he would be if it were a case of solicitor and own client. I think this motion fails on both the grounds put forward by Mr. Hansell, first, because I do not think the question of the Court protecting its own officer arises at all, because trustees and solicitors ought to know the legal position when they enter into the transaction; and secondly, I am quite clear it is not a taxation against a fund in which the trustee alone is interested. It is not a taxation as between solicitor and own client, but it is a taxation within the second class where the taxing Master has to say what is fair or proper. I do not want however to part with this case without saying this—that I hope, where the trustee has honestly sanctioned an expenditure which is clearly not excessive, the taxing Master will take a liberal view as far as possible in allowing the amounts against the estate which have honestly been incurred on behalf of such trustee.

Solicitors: *Cohen & Cohen; Solicitor Board of Trade.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
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Nov. 16, 17.

SELVAGE *v.* CHARLES BURRELL AND SONS, LIMITED.

Employer and Workman — Compensation — Accident — Disease — Series of Scratches extending over Period — Cumulative Effect — Blood Poisoning — Arthritis — Time of Infection not fixed — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The applicant, a girl of 19, was employed by the respondents, a firm of engineers, in their copper-plating department, as a finisher of shell adapters. In the course of her employment she from time to time sustained scratches to her hands which were commonly followed by gatherings and the pus thereby formed caused blood poisoning. The applicant commenced to work for the respondents in November, 1917. The first serious symptoms occurred at the end of March, 1918. She continued to work till April 27 following, and sustained further scratches on or about that date. The poison then became more diffused over her system. Her condition became worse until ultimately she was found to be suffering from arthritis of the joints caused by the poison of the pus, with the result that she was totally incapacitated. On a claim by her for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the applicant's hands were cut while at work for the respondents on or about April 27, 1918; that she was injured by an accident on that day; that those cuts suppurated and caused septic blood poisoning which developed into poly-articular-osteo-arthritis; that she had been and was totally incapacitated for work by the aforesaid injury by accident; and that the accident arose out of and in the course of the employment. On appeal:—

Held, that the applicant's condition was occasioned by accident arising out of and in the course of the employment, and that it was not material whether it was caused by a number of accidents which all contributed to that condition, or that they extended over a period of time, and that although the Court could not agree with the finding of the county court judge that the injury was due to the scratches on April 27, that did not destroy the effect of his substantive finding that her incapacity was the result of accident arising out of and in the course of the employment.

The decisions which require the applicant to specify the exact time and place of the accident have been considerably qualified by the decision of the House of Lords in *Innes* v. *G. & G. Kynoch* [1919] A. C. 765.

APPEAL from an award of the judge of the Thetford County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The facts of the case are fully stated in the judgment of the Master of the Rolls, and were shortly as follows:—

The applicant, a girl of 19, was employed by the respondents,

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a firm of engineers, in their copper-plating department, as a finisher of shell adapters. In the course of her work she from time to time sustained scratches to her hands which were commonly followed by gatherings and the pus thereby formed ultimately caused blood poisoning. The applicant commenced to work for the respondents in November, 1917. The first serious symptoms occurred at the end of March, 1918. She continued to work till April 27 following, and sustained further scratches on or about that date. The poison then became more diffused over her system. Her condition became worse until ultimately she was found to be suffering from arthritis of the joints caused by the poison of the pus, with the result that she was totally incapacitated. In proceedings by the applicant for compensation in the county court under the Workmen's Compensation Act, 1906, it was contended on behalf of the respondents that there was no evidence of an accident within the meaning of the Act.

The county court judge by his award found that the applicant's hands were cut while she was at work for the respondents on or about April 27, 1918; that she was injured by an accident on that day; that those cuts suppurated and caused septic blood poisoning which developed in poly-articular-osteo-arthritis; that she had been and was totally incapacitated for work by the aforesaid injury by accident; and that the injury arose out of and in the course of the employment.

The respondents appealed. The appeal was heard on November 16, 17, 1920.

W. Shakespeare for the respondents. The incapacity of the applicant was not occasioned by an injury arising out of or in the course of the employment. To constitute an accident within the meaning of the Act there must be some definite event to which the injury is attributable. The whole of the judgments in *Innes* v. *G. & G. Kynoch* (1) proceeded on the assumption that there was a definite event and that the injury was not the result of a gradual process. That case does not touch the present.

(1) [1919] A. C. 765.

[LORD STERNDALE M.R. You cannot say that a scratch was not an accident.]

No.

[SCRUTTON L.J. Was each scratch on the girl's hands an accident?]

Yes. The Act differentiates between disease and accident. It uses the word "accident" in two different senses: (1.) accident in the ordinary sense of the word, and (2.) injury from disease: see s. 8, sub-s. 1 (iii).

[SCRUTTON L.J. The present case seems to differ from the decided cases. There are here a series of accidents.]

The incapacity in this case was not due to accident, because it was not due to one event, but to a series of events. It is like the case of "beat hand" and "beat knee," which have been held not to be injuries caused by "accident" within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897: *Marshall* v. *East Holywell Coal Co.*; *Gorley* v. *Backworth Collieries*. (1)

In *Fenton* v. *Thorley & Co.* (2) Lord Macnaghten said: "The expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." He there differentiates the two things. When you have an event you get an injury; when you have a series of events you get an incapacity due to disease.

[WARRINGTON L.J. The dictum of Lord Macnaghten is explained in *Trim Joint District School* v. *Kelly*. (3)]

In *Eke* v. *Hart-Dyke* (4) it was held that unless the applicant can indicate the time, day, circumstance, and place in which the accident occurred which occasioned the disease, by means of some definite event, a case of "injury by accident" within the meaning of s. 1, sub-s. 1, of the Act cannot be established; and see s. 2, sub-s. 2, as to notice in respect of an injury under

(1) (1905) 93 L. T. 360.
(2) [1903] A. C. 443, 448.
(3) [1914] A. C. 667.
(4) [1910] 2 K. B. 677.

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the Act. Here it is submitted that whether there was an accident or a series of accidents the condition of the applicant did not arise out of and in the course of the employment. There is no evidence on which the county court judge could find that the applicant's condition was due to scratches received by her on April 27, 1918. The case should be sent back for a new trial.

Disturnal K.C. and *A. L. B. Thesiger* for the applicant. The evidence of the applicant's doctor clearly establishes that the poison was absorbed into her system through the cuts he saw on April 29. The award of the county court is perfectly good having regard to the whole of the evidence. It is sufficient to support the award to show that she sustained these cuts, and that it was through these cuts that she absorbed the poison which caused the accident. In *Innes* v. *Kynoch* (1) Lord Buckmaster pointed out the difference between accident and disease. The Third Schedule to the Act shows the line of demarcation drawn between accident and disease. It would not be right in this case to assume that the poison was absorbed from every one of the cuts. Each cut in this case was an accident, and if there is a series of accidents which or some of which result in the injury which produces the incapacity that is sufficient to satisfy the statute. It is not necessary to establish with precision the date when the particular scratches absorbed the poison. In *Fenton* v. *Thorley & Co.* (2) Lord Macnaghten said that "the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." See also *Higgins* v. *Campbell & Harrison; Turvey* v. *Brintons* (3), which was affirmed by the House of Lords sub nom. *Brintons* v. *Turvey*. (4) It is impossible to say in this case on what particular day a particular cut was received or through what particular cut the poison was absorbed into the system, but that is no reason for saying that the blood poisoning was not the result of an accident and thereby to debar the

(1) [1919] A. C. 765, 774.
(2) [1903] A. C. 443, 448.
(3) [1904] 1 K. B. 328.
(4) [1905] A. C. 230.

applicant from claiming compensation : *Burvill* v. *Vickers.* (1) Applying the tests laid down by Lord Birkenhead in *Innes* v. *Kynoch* (2) to the present case, there is here admitted incapacity, which it is submitted has been brought about by what the Legislature regards as accidents. There is abundant evidence to support the award of the county court judge. If necessary the award could be supported under s. 122 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which enables the Court on the hearing of an appeal to draw any inferences of fact and either to order a new trial or judgment to be entered for any party as the case may be.

W. Shakespeare replied.

LORD STERNDALE M.R. This case raises the ever-recurring question of whether the incapacity of a workman, or work girl, as it was in this case, is the result of an accident arising out of and in the course of the employment; but it raises it under circumstances unlike those of most cases. I do not know that personally I have ever had to deal with the question in circumstances resembling the present. The history is very short. The applicant, a girl of about 19, was employed by the respondents, who are a firm of engineers, in their copper-plating department. Part of her employment was to do work upon certain articles which are called "shell adapters." It is unnecessary to describe exactly what "shell adapters" are. They had to be cleaned before they would take the copper-plating, and they were cleaned by being put into baskets which were placed first in hot water, then in cold water, then in a solution of cyanide of potassium, and then in cold water again. The shell adapters were then taken out of the basket and cleaned with brushes driven by electricity at considerable speed, some of the brushes being of bristles and others of brass wire. In order to clean certain parts of a shell adapter, the girl had to hold it in a way described by one of the witnesses, with the result that her fingers sometimes came in contact with the brushes, and sometimes with a sharp or projecting part of the adapter, and so, from one cause or the

(1) [1916] 1 K. B. 180, 184. (2) [1919] A. C. 765, 772.

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other, were apt to get cut, abraded, or scratched—I do not think it matters what the injuries are called, but they were injuries which broke the skin and allowed deleterious germs that might be about to enter. I think the evidence called shows also, that the scratches sustained in this business were commonly, I do not say always, accompanied or followed by gatherings and formations of pus, which introduced more or less poison into the system and thereby caused blood poisoning. Those broadly and unscientifically stated are the facts. It was not a case, as far as I can understand, where there was any known bacillus peculiar to the occupation, but for some reason which is not explained, but which I do not think is material, the scratches or cuts occasioned in this occupation were more liable to cause, and did more often cause, formations of pus and the consequent danger of poison, than scratches or cuts met with in ordinary life.

The applicant went to work in November, 1917, and continued to work until April, 1918. There is no particular history of the matter until January, 1918. I will take it that her employment for the purpose of this appeal was from January, 1918, to April, 1918, during which period from time to time, according to the evidence, she did sustain the scratches or cuts to which I have alluded. They caused gatherings which formed pus, and a white fluid, that was described in the evidence, was emitted from time to time. The first serious instance seems to have occurred about the end of March, 1918, as it was said that the pus then first manifested itself and the girl's right forearm and wrist was crippled. This would show a distribution of poison over the system in March. She continued to work until April 27 afterwards. I do not think it is quite clear whether she actually received another scratch on that day or not, but she did receive some scratches at or about that date. The result, unfortunately, was that the poison became more widely spread throughout her system. Her condition became worse and worse, until she was found to be suffering from arthritis, or, as it is more fully described by the doctors, septic poly-articular-osteo-arthritis. The

unfortunate result has been that the poor girl is now absolutely crippled, in all probability, according to the medical evidence, for life.

The question is whether she is entitled to recover compensation. The learned county court judge has held that she is entitled to recover, and he has so decided upon the following findings of fact which are stated in his award: that the applicant's hands were cut while she was at work for the respondents on or about April 27, 1918, by the adapters, and that she was injured by accident on that day; that those cuts suppurated and caused septic poisoning which developed into poly-articular-osteo-arthritis; that the applicant had been and was totally incapacitated for work by the aforesaid injury by accident; that she was 19 years of age and was earning 25*s.* 4*d.* a week at the date of the accident. He therefore came to the conclusion that the injury by accident arose out of and in the course of the employment. Now the substantive finding that has been questioned is this: that the injury by accident arose out of and in the course of the employment. The other findings the learned county court judge has stated in his award in order to show the grounds upon which he arrived at that conclusion, and he has done so, no doubt, and we are indebted to him for so doing, because this Court has said from time to time that it is very convenient in deciding these cases to know exactly what the learned county court judge has found. The medical evidence is to this effect. The family doctor, Dr. Minns, says that he only examined the applicant on April 29, when "he found her right wrist swollen and painful and fingers with abrasions—small cuts, some of them healed, some of them not. Her right ankle was inflamed and painful and she complained of pain in her abdomen." On being asked by the learned county court judge "What conclusion did you come to?" he answered: "That there was inflammation in the abdomen. There was also some greenish discoloration round her lips, and also round her nails—the fingers. In her mouth the mucous membrane, or covering, was somewhat red. There was also a slight greenish discoloration where the teeth would

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meet the gums. I noticed also that in the unhealed cuts in her fingers there was some pus, and that her whole general system was bad. I think that would cover what I saw." Later on he stated that he attributed her condition to "septic poisoning absorbed possibly through the abrasions that she received—absorbed by the cuts on her hands which I noticed at my first examination." That statement was qualified by him in cross-examination in the way in which I will mention directly, but that seems to me to be evidence that the condition was caused, not only by the one cut which she received on or about April 27, but by the cuts which he observed, some of which were healed, and some were not—cuts therefore which were received over a considerable period. As I said, in cross-examination he perhaps qualified his statement to a certain extent, though I think when his evidence is fairly read there is very little difference between his examination and his cross-examination. The learned county court judge in his notes has taken the evidence of this gentleman as being that the poison got in at the cut and the septic condition arose at the end of April, and not earlier. I do not think that that correctly represents the effect of the doctor's evidence which I have already read. Then in cross-examination the doctor was pressed, to elicit from him that the absorption of pus must have been a gradual thing, not arising from the one last cut, but from the number of cuts which she had received, each causing a certain amount of formation of pus, and each producing a certain amount of absorption of poison into the system, until the condition at the end became that which has been described, and that view I think he adopted. His evidence is not very clear in my opinion, but that I think is what he means and is what he meant in the first instance. The question was put to him that the septic osteo-arthritis was brought about by the accumulation in the system in small doses and the entering into the system from time to time. At first he said he did not agree with that, but later he said: "If you wish me to go by the evidence already given"—that is, the evidence of the number of cuts that he had seen—"such would be the case"; and I take it by that

he means: "If I attended to the evidence as to what I saw, it would be the case that there was absorption from time to time by the different cuts, and it was not all occasioned by one cut." And that is the evidence of another doctor who had been called in in consultation. He said: "I thought it very reasonable to assume that the disease had been caused by septic absorption—it frequently is—and that the septic absorption took place through the injuries to her hands which have been described"—that is the number of scratches from time to time. Later on when asked: "It looks as though the more pus she absorbed the worse she got," he answered, "Yes." Then he was asked: "Then when she got enough pus into her system the joints began to be affected?" And his answer was, "Quite." That I think fairly represents the facts of the case which were spoken to by the medical witnesses, and the conclusion seems to me inevitable—in fact there is no evidence the other way—that the scratches took place from time to time; that they caused the formation of pus from time to time; that the more frequent the scratches became the more frequent was the formation of pus and the worse the condition of the patient became, until it culminated towards the end of April in the unfortunate condition which I have mentioned.

The question we have to decide is whether that condition is one resulting from accident arising out of and in the course of the employment. I do not think it can be, or was in fact contended, that these scratches or cuts were not accidents arising out of and in the course of her employment. The argument as I understand it is that you cannot put your finger upon any one scratch as being that which produced the septic condition, so that it can be said to be the result of an accident because you cannot define the time or place of the accident which produced the injury. This case was likened to that of what is called beat-knee or of inhaling sewer gas, or cases of that kind, in which it has been held that the condition was either the result of disease or was not the result of an accident. This, to my mind, is not like those cases, because here the condition does undoubtedly result from accidents which have

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arisen out of or in the course of the employment—namely, the scratches of which I have spoken. Supposing that this condition had been the result, as the learned county court judge seems to have been inclined to find, of the one cut on April 27, I do not think there can be any question but that it was a condition arising out of and resulting from the accident. Clearly the question we have to decide is: Is the condition less the result of an accident, because, in addition to that accident, there were a number of other previous accidents which all contributed to the septic condition of the patient which eventually resulted? The question is one of difficulty, but I have come to the conclusion that that circumstance does not prevent the condition from arising from accident.

Of course the trouble in a case like this is in dealing with the authorities which have laid down that the time and place at which the accident happened from which the condition results must be fixed. But it seems to me that the doctrine thus laid down with considerable strictness in some of the cases, and rightly so with regard to those particular cases, has been qualified to a great extent by the recent decision of the House of Lords in *Innes* v. *G. & G. Kynoch.* (1) I quite agree that the House of Lords there were not considering a case like the present. In that case there was in all probability only one accident, although I do not think that necessarily follows. A man who was working in certain works which involved the presence of certain bacilli had sustained an injury to his leg which gave an opportunity for the entrance of bacilli into his system. When, where and how the injury to his leg was occasioned I think there was no evidence to show, nor indeed was there any evidence to show the exact time at which the bacilli took advantage of the wound in the leg to enter the system; and although the point in this case was not before the noble and learned Lords in that case, I think their decision does qualify the strictness of what had been said in a great many of the cases, that you must be able to put your finger upon the exact place and

(1) [1919] A. C. 765.

time where and when the accident happened. I cannot see that the fact that the condition results from several accidents prevents it resulting from accident within the meaning of the statute. The statute does not lay down that there must be only one accident, and if the condition is occasioned by what were in truth and in fact a number of accidents arising out of and sustained in the course of the employment, I do not think it matters that there were more than one, or that they extended over a considerable period. I can see that there may be difficulties in ascertaining which is the accident of which in accordance with the Act notice is to be given or a claim made. That question is not before us here, and although it might involve a very considerable difficulty in fact, I do not think it operates to destroy the conclusion to which I have come—namely, that the applicant's injury does arise from accident arising out of and sustained in the course of the employment.

The learned county court judge has, as I have said, in his award come to the conclusion that this injury was occasioned by a cut sustained on or about April 27, meaning, I take it, that this was the only cause from which the whole condition resulted. I cannot agree with that. I think the medical evidence is to the contrary, and is to the effect which I mentioned. But I do not think that the fact that he has gone wrong in one of his findings upon which he relies to support his final, and substantive finding—namely, that the injury by accident arose out of and in the course of her employment, and that the incapacity resulted from it—destroys the effect of that substantive finding; and therefore, although I do not agree with one of his findings on which he has pronounced judgment, I think that the judgment is right and that the appeal fails.

I ought perhaps to say that if it were necessary to resort to it I think we should be able to support this judgment under the provisions of s. 122 of the County Courts Act, 1888, but I do not think it is necessary to have resort to that Act. My conclusion is that the appeal fails, and must be dismissed with costs.

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WARRINGTON L.J. The learned county court judge here has found that the applicant suffered injury by accident arising out of and in the course of her employment, and that the incapacity from which she undoubtedly suffers is the result of that injury by accident. The question we have to determine is whether that finding of the learned judge can be supported by the evidence. Now it is unnecessary for me, after the statement of facts and the result of the evidence which the Master of the Rolls has given in his judgment, to do more than state broadly the conclusion at which I have arrived. It seems to me to be amply established by the evidence; first, that the applicant suffered a series of accidents, that is to say, accidental cuttings or scratchings of her hand; secondly, that those accidents happened or arose out of and in the course of her employment; and thirdly, that she suffered personal injury by those accidents, whether the injury be regarded as the cutting of the skin of her hand, or as the subsequent or consequent entry into the wounds of poison germs; whichever be logically the fact, the subsequent incapacity was clearly the result. I think further that it is established by the evidence, though this point may not in truth be material, that the poison germs which entered the wounds were germs found in the place where she was working, and as the result of the conditions under which she and others were working. I say that, because the evidence of the other woman who was employed in the works was to the effect that she also received cuts and scratches which suppurated much in the same way as the cuts and scratches received by the applicant did; and I think the only inference that can be drawn is that there was something in the place in which they worked which rendered any cuts there received peculiarly liable to septic poisoning.

Now if the incapacity had resulted from poison entering the system through a single cut received on a particular day, and at a particular place, there would I think be no doubt that the applicant would have been entitled to compensation; and if that be so, I really can see no reason why, if the incapacity results from a series of cuts and the subsequent admission of

poison which has a cumulative effect, so that the incapacity, instead of happening suddenly, gradually results, that fact should make any difference. *Innes* v. *Kynoch* (1) appears to me to be even a stronger case than the present. There the abrasion, that is to say, the accidental injury itself, was not shown to have arisen out of and in the course of the employment, and the Court was driven to treat the entry of the poison germs as subsequent to the injury itself, and obviously no particular time could be predicated as that on which those poison germs entered the then existing abrasion. No doubt there is a difficulty arising from the fact that the Act, by making it necessary to give notice of the accident within a certain time, seems to contemplate that the accident shall be one happening at a particular time which can be identified with some certainty. But I think that difficulty is to a large extent removed by what Lord Birkenhead says in *Innes* v. *Kynoch* (1): "It is no doubt the fact that in *Brintons' Case* (2) a particular time was found as being that at which the contact had occurred"—that is the contact of the poison germs with the wounded person—"But all that is material is that the infection should have been the result of contact at some one particular time and that this one particular time should have been during the course of the employment. Some expressions, such as those referred to in the judgment of the Second Division, have been from time to time used, but none of them are binding upon this House; and indeed when these various expressions are examined in connection with one another they appear to me to come to no more than this, that it must be established that the disease is due to some particular occurrence, otherwise it cannot be the result of accident. That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment."

Now the particular time here may be the happening of each one of the cuts, and if it were necessary to fix the time as from

(1) [1919] A. C. 765, 772. (2) [1905] A. C. 230.

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which the period necessary for giving notice would commence, it would not be impossible I think to say that that time would be the happening of an event upon which the consequences were first observed to be serious. I think it might very well be that the Court would be in a position to remove any difficulty occasioned by the requirement as to notice by some such process as that which I have indicated.

Now with regard to the learned judge's particular finding—namely, that the applicant's hands were cut while she was working for the respondents on or about April 27, 1918—it seems to me upon reflection that it creates no real difficulty. It is true in my judgment that that finding is not supported by the evidence; but the finding with which we have to deal is the more general one—namely, that the applicant did suffer injury by accident arising out of and in the course of the employment; and if, as I think is the case, the evidence before the county court judge was sufficient to justify that finding, I think it is immaterial that it was based upon a finding which was not itself correct.

For these reasons I agree that the appeal fails and must be dismissed.

SCRUTTON L.J. This is no doubt a novel and important case, but I so entirely agree with the judgments that have been delivered, that I do not think it necessary to express in my own words the reasons for my concurrence with them. If my words are to be the same, I need not say them; but if I expressed myself in different words the effect would only be to enable reporters and ingenious counsel in other cases to make them a ground for further argument.

Appeal dismissed.

Solicitors for respondents: *Carpenters.*

Solicitors for applicant: *Moodie & Sons, for Bankes, Ashton & Co., Bury St. Edmunds.*

W. I. C.

[IN THE COURT OF APPEAL.]

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1920
Nov. 19.

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Employer and Workman—Injury by Accident—Compensation—Industrial Disease—Miner's Nystagmus—Certificate of certifying Surgeon—Appeal to Medical Referee—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*i*) (*a*), (*c*), (*f*); *sub-s.* 4—*Regulations of Secretary of State, Form* 15, *Reg.* 16.

Upon a reference to a Medical Referee, on appeal from the making by a certifying surgeon of a certificate that a workman is suffering from an industrial disease, and is thereby disabled from earning full wages, the Medical Referee has to consider two questions only: (1.) Whether the workman was, at the date of the certificate, in fact suffering from the disease, and was thereby disabled, and (2.) whether the certifying surgeon was right as to the date (if any) fixed by him as the commencement of the disablement. He has no jurisdiction to consider the question of the liability or otherwise of the employer, and if he does so, and bases his decision thereon, that decision will not be final within s. 8, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1906.

Regulations of Secretary of State, Form 15, observed upon.

APPEAL from the judge of the Barnsley County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a miner, entered the service of the respondents in November, 1919. On January 30, 1920, he obtained a certificate from the certifying surgeon that he was suffering from nystagmus, and was thereby disabled from earning full wages at the work at which he was employed. The respondents, being aggrieved by the action of the certifying surgeon in giving the certificate, applied for a reference to the Medical Referee under s. 8, sub-s. 1 (*f*), of the Act on the ground that previous to the applicant's entering their employment he was suffering from, and had been in receipt from his former employers of compensation for, nystagmus; and, further, that the certificate did not state the date of disablement. In giving his decision the Medical Referee simply followed Form 15 prescribed by the regulations made by the Secretary of State, by stating that he allowed the appeal. On the hearing of the arbitration it was objected, on behalf of the respondents, that the decision of the Medical Referee

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was final, and that the proceedings were not maintainable. It was contended for the applicant that having regard to the grounds on which the reference to the Medical Referee was made, his decision was bad in law, or, in the alternative, that it was void for uncertainty. The county court judge was of opinion that it was uncertain whether the Medical Referee found (*a*) that the applicant was not suffering from nystagmus at all, or (*b*) that although he was in fact so suffering the respondents were not liable. He accordingly, with the consent of both parties, communicated with the Medical Referee in order to ascertain the ground of his decision, and the Referee informed the judge that he did find that the man was suffering from nystagmus, but that he came to the conclusion that the respondents were not responsible, as the applicant had himself stated that when he started work with them he had not recovered from the nystagmus which he had contracted while he was working for his previous employers. Acting upon this information the county court judge held that the grounds on which the Medical Referee's decision was based were not within his jurisdiction to consider. His decision was therefore bad in law, and could not be final within the Act. The arbitration proceedings were therefore maintainable as if there had been no appeal to the Medical Referee and no certificate had been given by him.

The respondents appealed.

Willoughby Williams for the appellants. It was not open to the county court judge to entirely disregard the award of the Medical Referee. He ought either to have accepted it, or sent it back to him to fix the date of the disablement. The decision of the Medical Referee is final and the proceedings are not maintainable: *Frost* v. *Clanway Colliery Co.* (1); *Garrett* v. *Waddell & Son* (2); *Winters* v. *Addie & Sons' Collieries.* (3) It must be admitted that what the Medical Referee has done is wrong, but his decision cannot be treated as a nullity. The respondents are entitled to have his opinion on the points

(1) [1920] 1 K. B. 423.
(2) 1911 S. C. 1168; 48 Sc. L. R. 937.
(3) (1911) 48 Sc. L. R. 940.

before him. He is entitled to fix the date of the disablement and has not effectively done so. The matter should go back to him. The forms are unsatisfactory, as has often been pointed out.

[SCRUTTON L.J. They are not intended to be slavishly followed. See Regulation 16.]

Shakespeare for the respondent. The Referee exceeded his jurisdiction by going into the question of responsibility. The county court judge was right in treating his decision as he did, and the proceedings are maintainable. The respondent, however, is willing that the case should go back to him if it should be thought fit to send it.

LORD STERNDALE M.R. This is an appeal from the learned judge of the Barnsley County Court, and it raises rather a curious question as to the certificate of the certifying surgeon, and of the appeal from that to the Medical Referee. The workman was working for some months in 1918 for a colliery company, not the respondents. On November 7, 1918, he was certified to be suffering from nystagmus, and he received compensation on the ground of incapacity through nystagmus up to August, 1919. In August, 1919, he went to work again, and was earning the ordinary wages of a man of his class. In November, 1919, he entered the employment of the respondents, and worked for them up to January, 1920, still doing the ordinary work and receiving the ordinary wages of a man of his class. On January 30, 1920, he was certified by the certifying surgeon to be "suffering from miner's nystagmus, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed." The certificate then proceeded in the usual form, but did not state the date at which the disablement began, and, in that case, according to the Act, as the certifying surgeon must be taken to have been unable to certify the date of disablement, it is fixed by the date of the certificate—namely, January 30, 1920. The respondents on March 20, 1920, applied for a reference to the Medical Referee, and one of the

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grounds on which they so applied was that the workman only entered their employment in November, 1919, and that before that date he was suffering from, and had been in receipt of compensation for, nystagmus; and further that the certificate did not state the date of the disablement. Of course the reason of their stating as a ground of their application that he had been suffering from nystagmus before entering the employment of the respondents was to show that they were not responsible for the consequences of his condition. That is not a matter for the Medical Referee at all. The Medical Referee gave his decision in writing in the terms of Form 15 prescribed by the Secretary of State's Regulations under the Act. He simply said this: "I allow the appeal of the East Barnsley Colliery Company, Limited, against the certificate of disablement granted to Reuben Turton on January 30, 1920." Some correspondence then took place, the workman's solicitor pointing out that in his opinion the appeal was not allowed on the ground that the man was not suffering from nystagmus, but that he had not contracted the disease whilst in the respondent's employ, and asked that the award of the Medical Referee should be withdrawn, and the question of liability decided under the provisions of the Act. That was refused by the respondents, and thereupon proceedings were instituted for an arbitration under the Act. When the case came before the learned judge the preliminary point was taken that the proceedings were not maintainable, because the certificate of the Medical Referee was conclusive on the matter, and showed that there was no ground for a claim. To that it was answered that the certificate or award of the Medical Referee was invalid on two grounds, either that it was uncertain, or that, looking at the award and the request for reference to the Medical Referee together, it would appear that he might have decided upon grounds on which he had no right to decide. The learned county court judge was inclined to think that the award was void for uncertainty, but he said very sensibly, "We ought to know what the real facts are upon which the Medical Referee decided," and the parties consented that he should communicate with the Medical

Referee in order to ascertain the grounds upon which he had allowed the appeal. The learned judge did so, and he tells us the result as follows: "I communicated with the Medical Referee, and he has informed me that he did find that the man was suffering from nystagmus, but that he came to the conclusion that the East Barnsley Company were not responsible, as the man himself definitely stated that when he started work with them he had not recovered from the nystagmus which he had contracted whilst working for his previous employer." If that was the ground of the learned Referee's award, it was a ground which he had no right to entertain: he has nothing to do with the question of responsibility. That has to be ascertained by the county court judge, and all that he has to ascertain is whether the man is suffering from nystagmus, whether the nystagmus is connected with coal-mining, whether inability to earn full wages has resulted from it, and the date of the disability; he has nothing whatever to do with the question of responsibility. On that the learned county court judge decided that the preliminary objection was bad and that the arbitration must proceed.

It is against that decision that this appeal is brought; and looking at the grounds stated in the notice of appeal it is clear that the only question before us is whether the county court judge should have refused jurisdiction on the ground that this matter had been decided finally by the award of the Medical Referee, because the grounds of the appeal are these: "1. That the learned judge of the county court was wrong in law in deciding that the said certificate was void for want of certainty. 2. That the learned judge was wrong in law in deciding that the said certificate was bad in law. 3. That the learned judge was wrong in law in deciding that the said certificate was not final. 4. That the learned judge was wrong in law in deciding that the said arbitration proceedings were maintainable." I think the learned judge was quite right in deciding that the arbitration proceedings were maintainable, and that when he had obtained the information from the Medical Referee the position was the same as if the Medical Referee had written those grounds upon

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the face of his award as the grounds upon which he had acted, in which case it would have appeared on the face of the award that he had acted on grounds which were entirely beyond his jurisdiction to entertain. That is sufficient really to dispose of the appeal. But it did occur to me that possibly the county court judge might, although he was quite right on that point, have gone a little too far in saying: "I further hold that the arbitration proceedings are maintainable just as if no appeal had been made to the Medical Referee and no certificate given by him." It may be that he only meant that the Medical Referee's award was not a bar, but it did occur to me that the words might mean something more—namely, that the matter must be treated not only as if there had been no appeal to the Medical Referee, but as if there could be no appeal. It is not necessary to decide the point, because counsel for the respondent here, the applicant in the county court, has agreed that the employers should not be deprived of their right to ask the opinion of the Medical Referee on the matter. Therefore, though possibly we cannot bind the county court judge to send the matter back to him, there is no objection to his doing so when the arbitration comes on. But I should like to state quite clearly that the Medical Referee must understand now that he has nothing to do with deciding responsibility. He can decide whether the man is suffering from nystagmus or not; he can decide whether it arises from coal-mining; and he can decide whether he is incapacitated, and it may be, and I think it is the fact, that he can decide as to the date when the incapacity began. But if he does take it upon himself to decide when the incapacity began, which he need not, because he may say he cannot fix the date, just as the certifying surgeon may, he must remember that the date to be fixed is that of the incapacity, and not the date of the contracting of the disease, and without saying that he cannot find the date when the incapacity began I should like to point out that it is very difficult in this case to find that the incapacity began at an earlier date than August, 1919, because from August, 1919, to January, 1920, the man was actually working, and

earning his full wages, and that seems to point to this, that although he may have been, and was, disabled earlier by nystagmus, he had since August, 1919, recovered sufficiently to be no longer incapacitated by his former attack of nystagmus from earning his full wages, and that the present incapacity, which the Medical Referee or the county court judge has to deal with, can hardly have begun until he ceased to be able to work and to earn full wages like other men; and the Medical Referee must be careful not to confuse the two things —when did the incapacity begin, and when was the disease contracted? I think, considering the way in which he treated the matter in the first instance, it is essential to point that out, in case the matter should go back to him. But, as I have said on the only question really before us, I think the appeal fails altogether, and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion, and I will add nothing except a few words as to what it is, and what alone it is, the Medical Referee has to decide on an appeal under these provisions of the Act. In the first instance there is to be a certificate by a certifying surgeon, and that certificate deals with two matters, first, whether the workman is suffering from a disease mentioned in Sch. III., and secondly, whether he is disabled from earning full wages at the work on which he is employed. But by s. 8, sub-s. 4, a further duty is cast upon the certifying surgeon—namely, that of fixing the date of disablement. That sub-section provides that: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced," but with this additional proviso, that if he is unable to fix such a date it will be the date on which the certificate is given. Therefore it simply comes to this: where the certifying surgeon does not know the date of the disablement, then he simply certifies that the man is suffering from a disease, that he is, at the date of the certificate, disabled. He dates the certificate, and the date of the certificate is then technically the date of the disablement. The Medical Referee's duty is expressed in sub-para. (*f*) of sub-s. 1 of s. 8:

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"If an employer or a workman is aggrieved by the action of a certifying surgeon"—I will read the part which refers to the giving of a certificate—"in giving . . . a certificate of disablement . . . the matter," that is, the giving of the certificate of disablement by the certifying surgeon, "shall . . . be referred to a medical referee." All that the Medical Referee has to consider on a reference to him under that sub-section is: Was the certifying surgeon right or wrong in certifying that on the blank day of blank the man was suffering from disease, and was disabled, and, if he has fixed a date of disablement, was he right or wrong in fixing that date of disablement? With that statement of what seems to be the duty of the Medical Referee, I agree that the proper course is to dismiss the appeal, and let the matter go back to the county court judge on the footing that he should obtain further information from the Medical Referee, to be given, no doubt, under instructions as to what his duties are.

SCRUTTON L.J. I agree with the judgments which have been delivered, and I only desire to add on my own account that I think it would be a great misfortune if persons concerned in proceedings under this section should continue to attach that rigid sanctity to the forms in the Appendix which they seem disposed to do at present; they simply copy out the whole forms, apparently conceiving themselves to be bound by them. Here the Medical Referee has followed Form 15 prescribed in the Regulations, regardless of the fact that Regulation 16 requires him to use the form "subject to such additions and modifications as the circumstances of the case may require." When there are three matters brought before the Medical Referee on appeal, and he simply allows or dismisses the appeal, he leaves it quite uncertain what he has done, whether he has allowed the appeal under head 1, or whether he has allowed the appeal under head 2, or whether he has allowed the appeal under head 3. Simply to say that he allows or dismisses the appeal gives no real information to the parties as to what his findings are. In my view he should make such

additions or modifications, as he is allowed to do by Regulation 16, as to show what he is deciding on the point whether the workman is suffering from the disease, what he is deciding on the point whether the workman is thereby disabled from earning full wages, and what he is deciding as to the date of disablement, which by s. 8, sub-s. 4, of the Act is referred to him. If he does that his decision will be enlightening to the parties; but when he simply says, I allow or dismiss the appeal, it leads to the difficulties which have arisen in this case.

Appeal dismissed.

Solicitors for the appellants: *Smiles & Co., for James E. Wing, Sheffield.*

Solicitors for the respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

G. A. S.

BRITISH STAMP AND TICKET AUTOMATIC DELIVERY COMPANY, LIMITED *v.* HAYNES.

1920 *Nov.* 23, 24.

[1920. B. 713.]

Contract—Hire of Goods—Breach—Refusal to Accept—Measure of Damages.

The defendant, in breach of his contract, refused to accept two machines which he had hired from the plaintiffs for three years at a weekly rent. The plaintiffs, whose business it was to let out machines, made no attempt to relet these two machines. At all times material to this contract they had more than two machines in stock:—

Held, that the measure of damages was not the aggregate of the three years' weekly rents, but (1.) the amount of the weekly rents from the time when they became payable under the contract, that is the date when the machines were tendered, until the expiration of such reasonable time as the plaintiffs would have required thereafter in order to relet the machines on hire; (2.) the cost of transport of the machines; and (3.) the commission to the agent who procured the contract, if payable notwithstanding breach.

TRIAL of an action before Salter J. without a jury.

The plaintiffs were manufacturers of automatic postage stamp delivery machines, and the defendant carried on

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business as a restaurant keeper in Birmingham. By an agreement in writing dated August 18, 1919, the defendant agreed to take two of the plaintiffs' machines on hire for three years at a weekly rent. The defendant, when the machines were subsequently tendered to him on November 17, 1919, refused to take them, and Salter J. held that he so refused in breach of the contract. Under the impression that it was their duty to keep these machines at the defendant's disposal, notwithstanding his refusal to accept them, the plaintiffs made no attempt to relet them.

Salter J. found as a fact that at no time between the date of the making of the contract and the present time did the plaintiffs' stock of machines fall so low as two.

One of the defences raised was that the contract was void in that it contemplated the erection of these machines for the purpose of selling stamps, with the knowledge that no licence to sell stamps had been obtained, contrary to s. 4 of the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38).

R. A. Willes for the defendant. This is a claim for damages by a bailor against a bailee, not a claim for rent, and the measure of damages is the same as in an action for damages for the non-acceptance of goods sold. That measure is the difference between the hire price of the machines under the contract from the time when refused, and the hire price the plaintiffs could obtain for them when returned on their hands, together with the cost of transport, if any, and any commission payable to the agent through whom the machines were let to the defendant. The plaintiffs appear to put their case in this way: "You have returned these machines to us and thereby our stock is increased by two machines." To make good that position they would have to show that the contract was a contract to reduce stock, and there is no evidence that that was the contract. The plaintiffs ought to have mitigated their loss, and cannot increase the damages by omitting to do what they would do in the ordinary course of business —namely, relet the machines. The onus of showing that they could not do so is on them.

The contract was void because made for an illegal purpose —namely, the erection of these machines for selling stamps, although no licence to sell stamps had been obtained, contrary to s. 4 of the Stamp Duties Management Act, 1891.

[*Hill and Sons* v. *Showell and Sons* (1) was cited.]

Bertram Long for the plaintiffs. [He was stopped on the point as to the contract being void.] The plaintiffs are entitled to be put in the same position financially as they would have been in had the contract been performed, in which case they would be in hand three years' hire, the amount claimed. Instead of that, and in view of the fact that their stock was never so low as two machines, these two machines, instead of earning the hire price under the contract, would lie idle. No doubt the plaintiffs were bound to take all reasonable steps to mitigate their loss; but what those steps should be is a question of fact in each case—*Payzu* v. *Saunders* (2)—and it would not be reasonable to ask the plaintiffs to relet these particular machines instead of machines from the rest of the stock.

SALTER J. In this case the plaintiffs say that they made a contract with the defendant to let out two of their machines on hire for three years at a weekly rent of 7*s.* each, and that he has broken the contract by refusing to take them. The contract is in writing, dated August 18, 1919, and it is common ground that the defendant refused to accept them. He sets up four defences. (1.) That there was no contract; the answer to that is, that the contract signed by him has been produced. (2.) That it was induced by fraud. (3.) That it was made subject to a condition. And (4.) that it was void by reason of the Stamp Duties Management Act, 1891.

[His Lordship considered grounds (2.) and (3.) and held that the contract had not been induced by fraud and had not been made subject to a condition.]

With regard to the fourth ground of defence—namely, that it was void, because it contemplated the dealing in stamps by an unlicensed person, contrary to s. 4 of the Stamp

(1) (1918) 87 L. J. (K. B.) 1106. (2) [1919] 2 K. B. 581.

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Duties Management Act, 1891—it may be that the defendant would have committed an offence if he had used these machines, or even if he had erected them, but I am not to say that he would have acted in contravention of the law, and therefore I cannot see anything illegal in the contract. That being so, I find that the defendant in refusing to accept these machines committed a breach of contract, and the only remaining question is one of damages.

The party with whom a contract is broken is entitled to be put in the same position as he would have occupied if the contract had been performed, but he must take reasonable steps to mitigate the loss he sustains, and the damages are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

The evidence as to damage is vague and unsatisfactory. The facts are these. The plaintiffs carry on the business of letting out stamp-selling machines on hire, and they have machines of more than one type, the machines in question being known as number 9 type. Of these number 9 machines there was always a number out on hire, and always some smaller number in stock, and both at the time when the contract was made and when it was broken the plaintiffs had in hand about eight or ten. These two machines were wrongly thrown back on to their hands, and being under the impression that it was their duty to keep them at the disposal of the defendant, they in fact made no attempt to relet them on hire. I think that in this respect they took a wrong view. I find as a fact that from the time of the making of the contract until the present time the plaintiffs always had more than two of this number 9 type machine in stock. On behalf of the plaintiffs it was contended that as a result of the breach they always had two more machines on their hands than they would otherwise have had, and have therefore lost the hire price of two machines. I think that this is a mistaken view. To introduce the question of the state of the plaintiffs' stock is to treat the contract as a contract to reduce stock, and is

introducing matters which are too remote. No question of stock was in the mind of either party to the contract, and this cannot on the principle of *Hadley* v. *Baxendale* (1) be considered as a basis of damages. In my opinion the damages which the parties may reasonably be supposed to have contemplated were these. Firstly, the expenses incurred in despatching the machines to the defendant, and money thrown away in the shape of commission payable to the traveller procuring the order. No evidence was called as to the cost of transport, therefore I assume that it was paid by the defendant. And there was no evidence that the commission was payable in case of breach, so that under these two heads nothing is payable. The second head of damages should be, in my opinion, the hire price from the date of the tender of the machines in accordance with the contract until the expiration of such a period as the plaintiffs would require, making reasonable despatch, in order to let the machines out to somebody else. The evidence was that the plaintiffs would require four weeks in which to relet them. I therefore give judgment for the plaintiffs for 2*l.* 16*s.*, being four weeks' hire.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Ashurst, Morris, Crisp & Co.*

Solicitor for defendant : *W. J. Pitman, for J. Hall-Wright, Birmingham.*

(1) (1854) 9 Ex. 341.

W. L. L. B.

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Nov. 24, 25;
Dec. 20.

BLUNDELL-LEIGH *v.* ATTENBOROUGH.

[1920 B. 558.]

Pledge—Validity—Deposit and subsequent Pledge of Goods—Intermediate wrongful Sub-pledge by Pledgee.

Where goods purported to be pledged are not, at or after the time of the contract to pledge, in the actual or constructive possession of the pledgor or pledgee, or of any agent of either, no valid pledge is possible.

On November 1 the plaintiff handed her jewellery to one M. in order that he might examine it and have it valued to enable him to decide whether he would make any advance to her thereon. M. on the same day pawned the jewellery with the defendant, a pawnbroker, who took it in good faith, for 1000*l.*, the transaction being completed on November 3. On November 4 M. sent to the plaintiff a receipt for "the twelve articles of jewellery you have deposited with me." On November 5 it was arranged between the plaintiff and M. that he should lend her 500*l.*, and that she should give him a promissory note for 600*l.*, payable in six equal monthly instalments, and that he should retain possession of the jewellery as collateral security for the payment of the promissory note on the terms that if she made default he was to be at liberty to dispose of the articles. On December 8 M. borrowed 300*l.* from one B. and deposited with him as security for repayment the plaintiff's promissory note and the defendant's counterfoil deposit note. B. gave notice to the plaintiff of the deposit of the promissory note and required that payments under it should be made to him. On December 16 M. committed suicide. The plaintiff paid B. various sums amounting to 400*l.* on account of the sum due on the promissory note, the payments being made with notice of the defendant's position and claim. She, however, made no tender to the defendant, and claimed the return of her goods:—

Held, that the handing of the jewellery by the plaintiff to M. on November 1 was a mere gratuitous bailment, and that M. thereby acquired no right of property in, or disposition over, the jewellery; that the pawning of the jewellery by M. with the defendant was in fraud of the plaintiff and of the defendant, and that it determined the bailment; that as M. acquired no right to hold the goods against the plaintiff by virtue of the original bailment he could not give any right thereunder to the defendant; that there had never been any valid pledge of the jewellery by the plaintiff to M., inasmuch as the goods were not at the time of the contract of pledge, and had never since been, in the actual or constructive possession of the pledgor or pledgee or of any agent of either, and that therefore M. never acquired any right to hold the goods against the plaintiff which he could transmit to the defendant or which could enure to the benefit of the defendant.

ACTION tried by Salter J.

The following statement of facts is taken from the judgment:—

"In this case the plaintiff sues to recover possession of certain jewellery, her property, which has been pawned by a third party with the defendant, who is a pawnbroker.

"In October, 1919, the plaintiff owed 400*l.* to Barton, a bookmaker, and he was pressing for payment. George Miller carried on business at 34 Oxford Street and described himself as a financial agent. He appears to have been a moneylender or a moneylender's tout. About a year before, he had lent the plaintiff a small sum and she had deposited a small quantity of jewellery with him as security for the repayment of the loan. Miller, who had an interest in Barton's business, wrote to the plaintiff to ask if he could assist her. At an interview he asked her whether she had jewellery which she could deposit with him, if necessary, as security. It was arranged that she should hand him her jewellery so that he might examine it and value it, or have it valued, to enable him to decide whether or not he would make any offer to assist her. On November 1 she handed to him the jewellery mentioned in the statement of claim in pursuance of this arrangement, and for this purpose only. He promised her to take good care of it and to place it in the custody of his bankers. He was under no obligation to make any offer, and she was under no obligation to accept any offer. There was no agreement to pledge or charge the jewellery. It was a mere gratuitous bailment. Miller acquired no right of property or disposition, and the plaintiff could have demanded the return of her jewellery at any moment.

"Having thus obtained possession of the jewellery, Miller forthwith pawned it with the defendant for 1000*l.* He handed it to the defendant on November 1, and the transaction was completed on November 3. The defendant acted in good faith, and no issue is raised that he was negligent or put upon enquiry. This pawning was in fraud of the plaintiff and of the defendant. It was a breach of the contract of bailment, and determined the bailment.

"On November 4, Miller sent to the plaintiff a receipt in these terms: 'Dear Mrs. Leigh, I beg to append herewith list of the twelve articles of jewellery you have deposited

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with me.' On November 5 the plaintiff went to Miller's office, and it was arranged that Miller should lend her 500*l.*, that she should give him a promissory note for 600*l.*, and that he should retain possession of the jewellery as collateral security for the payment of the promissory note. She received 500*l.* and signed a promissory note dated November 5, 1919, promising to pay George Miller or order 600*l.* in six equal monthly instalments, the first to be paid on January 1, 1920, the whole amount unpaid to become payable on default in payment of any instalment. She also signed a document dated November 5, 1919, addressed to Miller in the following terms: 'In consideration of you having this day discounted my promissory note for 600*l.* I hereby deposit with you as collateral security the following articles. . . . . Should I make default in payment of the said promissory note, you are hereby at liberty to dispose of the said articles either by public auction or by private treaty, and the amount realised to be taken in part consideration of my debt. In the event of the said articles realising more than sufficient to pay you for the amount of my indebtedness and any costs, charges and expenses, you are to hand over to me such balance. If they realise less than the amount of my indebtedness and any costs, charges and expenses, I undertake to pay you the amount thereof on demand.'

"On or before December 8 Miller borrowed 300*l.* from Berners, a bookmaker, and deposited with him as security for repayment the plaintiff's promissory note and the defendant's counterfoil deposit note, stating to Berners that the jewellery mentioned in the latter document was the property of his wife. Berners gave notice to the plaintiff of the deposit of the promissory note, and required that all payments under it should be made to him. On December 16 Miller committed suicide. The plaintiff has paid Berners sums amounting to 400*l.* on account of the sum due on the promissory note. She made these payments with notice of the defendant's position and claim. She makes no tender to the defendant and claims the return of her goods."

The defences raised by the defendant in his defence were as follows :—

" 1. The said goods were not and are not nor were nor are any of them the plaintiff's goods.

" 2. The defendant did not and does not detain the said goods nor any of them.

" 3. Alternatively, the defendant says that on or about the 3rd November, 1919, the plaintiff delivered all the said goods to one George Miller and verbally authorised him to raise money upon the same by pledging them, and that on the said 3rd November, 1919, the said George Miller pledged all the said goods with the defendant for the sum of 1000*l.* and interest upon the terms of a contract in writing of that date. The said sum of 1000*l.* with interest at the rate of 15 per cent. per annum still remains due and owing to the defendant.

" 4. Further alternatively, the defendant says that the plaintiff pledged all the said goods with the said George Miller to secure the payment to the said George Miller of the sum of 600*l.* then due from the plaintiff to the said George Miller, and that the said George Miller pledged the said goods with the defendant as aforesaid. The plaintiff has not paid the said sum of 600*l.* nor any part thereof, and that sum still remains due and owing from her.

" 5. Further alternatively, the defendant says that on the 3rd November, 1919, the said George Miller was a mercantile agent within the meaning of the Factors Act, 1889, and was then in possession of the said goods with the consent of the plaintiff, and that thereupon the said George Miller when acting in the ordinary course of business of a mercantile agent pledged all the said goods with the defendant in manner and for the consideration alleged in paragraph 3 hereof. The defendant received the said goods in pledge from the said George Miller in good faith and without notice that the said George Miller had not authority to make the said pledge."

Sir Ellis Hume Williams K.C. and *J. D. Cassels* for the plaintiff. The plaintiff is entitled to recover her goods from

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the defendant, as Miller was a mere bailee of them and had no authority to pledge them with the defendant.

Schwabe K.C. and *C. L. Attenborough* for the defendant. The various articles of jewellery were handed by the plaintiff to Miller on November 1 in order that he might raise money upon them, and therefore Miller had authority from the plaintiff to pledge them with the defendant and the plaintiff is not entitled to the return of the goods pledged without repaying the money advanced upon them. Even if Miller had no title to the goods when he pledged them with the defendant, so that he could not give a title to the defendant, yet when he afterwards acquired a title to them on November 5 from the plaintiff by the contract of pledge that title would enure for the benefit of the defendant, who was a transferee for value in good faith and without notice: *Whitehorn Brothers* v. *Davison*. (1) It was held in *Doe* v. *Oliver* (2) that the interest, when it accrues, feeds the estoppel. It is not necessary that there should be a transfer of possession in order that there should be a valid pledge. It was held in *Hilton* v. *Tucker* (3) that it is not essential in a pledge of goods that the advance and delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge. The mere fact that Miller did something with the goods when he was a bailee of them which he was not entitled to do does not disentitle him from afterwards becoming a pledgee of the goods. If Miller had redeemed the goods from the defendant he would be entitled to hold them as against the plaintiff until repaid the amount advanced by him to her upon the goods. The defendant is entitled to stand in the same position as Miller would have done, and therefore is entitled to hold the jewellery as security for the amount advanced by Miller to the plaintiff. Miller described himself as a financial agent. That does not mean a man who uses his own money but one who borrows money

(1) [1911] 1 K. B. 463.
(2) (1829) 2 Sm. L. C. (12th ed.) 746; 5 Man. & Ry. 202; 10 B. & C. 181.
(3) (1888) 39 Ch. D. 669.

from one person in order to lend to another. He comes within the definition of "mercantile agent" in s. 1 of the Factors Act, 1889, and as he was in possession of these goods with the plaintiff's consent he had under s. 2 of that Act authority to pledge them. It was held in *Oppenheimer* v. *Attenborough & Son* (1) that the authority given by that section is a general authority given to every mercantile agent. [*Cuthbertson* v. *Irving* (2); *In re Bridgwater's Settlement* (3); and *Gresham Life Assurance Society* v. *Crowther* (4) were also referred to.]

Sir Ellis Hume Williams K.C. and *J. D. Cassels* in reply. There was no valid pledge of these goods at all. They were merely handed by the plaintiff to Miller on November 1 for the purpose of examination. Up till November 5 he was a mere bailee of the goods and his improper dealing with the goods by pledging them with the defendant on November 3 determined the bailment: *Fenn* v. *Bittleston*. (5) In order that there may be a valid contract of pledge it is essential that there should be delivery of possession of the goods as part of the contract of pledge, although delivery may take place afterwards: see Story on Bailments, 9th ed., art. 297. That condition was not fulfilled in this case, because the goods were by the wrongful act of Miller in the possession of a third party at the time of the contract and Miller had placed it out of his power to restore them. The transaction on November 5 did not give the defendant any right to hold the goods. Having regard to the facts of the present case *Whitehorn Brothers* v. *Davison* (6) has no application. The foundation of the judgment in that case was that the necklace was handed by the plaintiffs to Bruford under a voidable contract, and it was intended that he should have the power of transferring the property therein to a purchaser. That was not a case of a mere bailment. In the present case Miller had at the time he pledged the goods no authority either to sell them or to pledge them. It was held in *Donald*

(1) [1908] 1 K. B. 221.
(2) (1859) 4 H. & N. 742.
(3) [1910] 2 Ch. 342.
(4) [1914] 2 Ch. 219.
(5) (1851) 7 Ex. 152, 159.
(6) [1911] 1 K. B. 463.

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v. *Suckling* (1) that where goods are pledged as security for the payment of a debt or bill of exchange and the pledgee repledges the goods the pledgor cannot recover the goods until he has paid or tendered the amount of the debt. That decision was followed in *Halliday* v. *Holgate*. (2) Those decisions, however, do not apply here, as the goods were not deposited with Miller under a contract of pledge.

Cur. adv. vult.

1920. Dec. 20. SALTER J. read a judgment which, after stating the facts set out above, was as follows :—

The defences raised in paras. 1, 2 and 3 of the defence fail on the facts. In my opinion the defence raised in para. 5 also fails. Miller was not a mercantile agent, and if he had been, the fraudulent pawning of the jewellery was not a disposition made by him when acting in the ordinary course of business of a mercantile agent.

It remains to consider the defence raised by para. 4—namely, that the plaintiff pledged with Miller and Miller with the defendant. I have already said that, in my opinion, Miller acquired no right to hold the goods against the plaintiff by virtue of the original bailment, and he could therefore give no such right to the defendant. Then, did the defendant acquire any right against the plaintiff by virtue of the transaction between the plaintiff and Miller on the 5th November ? In *Whitehorn Brothers* v. *Davison* (3) the plaintiffs, induced by the fraud of one Bruford, sent a necklace to him on sale or return. Bruford pledged it with the defendant, a pawnbroker, as security for an advance. Later, induced by further frauds of Bruford, the plaintiffs sold the necklace to him out and out and took his bills in payment. The bills were dishonoured, Bruford absconded, and the plaintiffs brought detinue for the necklace. On these facts the Court of Appeal held that even if Bruford acquired no title or right of disposition by virtue of the original delivery, nevertheless he acquired a

(1) (1866) L. R. 1 Q. B. 585. (2) (1868) L. R. 3 Ex. 299.
(3) [1911] 1 K. B. 463.

voidable title by virtue of the subsequent sale, and that this title enured to the benefit of the defendant and enabled him to hold the necklace against the plaintiffs unless paid the amount of his loan to Bruford. It follows in the present case that if Miller acquired a title by virtue of the purported pledge to him on November 5, such title would enure to the defendant's benefit and entitle him to succeed in this action in the absence of any tender by the plaintiff. In my opinion, there has never been any valid pledge of this jewellery by the plaintiff to Miller. Pledge is a conveyance pursuant to a contract, and it is essential to a valid pledge that delivery of the chattel shall be made by the pledgor to the pledgee in pursuance of the contract to pledge. Delivery may of course be made by and to agents, and it may be actual or constructive. If, at the time of the contract to pledge, the pledgee is already in possession in another capacity, the contract to pledge is itself constructive delivery. Even if the pledgee is not in possession at the time of the contract, but acquires possession from a third party subsequently, it may be that such acquisition of possession would, by virtue of the contract to pledge, amount to constructive delivery by the pledgor. But where, as in this case, the goods were not at the time of the contract to pledge, and have never since been, in the actual or constructive possession of the pledgor or pledgee, or of any agent of either, I think that no valid pledge was at any time possible. The defendant never held as Miller's agent; he held in his own right against Miller. Before the contract to pledge was made on November 5 Miller, by his fraud, had already rendered any valid pledge of the jewellery by the plaintiff to himself impossible. For this reason I think that Miller never acquired any right to hold these goods against the plaintiff which he could transmit to the defendant or which could enure to the benefit of the defendant.

It was argued that the plaintiff is estopped from denying that Miller made a valid pledge to the defendant, or else that she is estopped from denying that she made a valid pledge to Miller. I have considered this contention, although estoppel is not pleaded. In my opinion she is not estopped from denying

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either or both. I will assume that the defendant can avail himself of any estoppel which Miller could have set up. It is true she took his money and agreed that he should remain in possession of her goods as a pledgee. But she did not thereby mislead Miller, who knew well where the jewellery was, nor did she thereby induce Miller to alter his position to his detriment, or at all. As between the plaintiff and the defendant immediately, neither knew of the other until after Miller's death, and I can see no conduct on the plaintiff's part which could possibly raise any estoppel. Nor can it be said, in my opinion, that the plaintiff, by any negligence or laches on her part, enabled Miller to mislead the defendant.

For these reasons I think that the defendant never acquired any right to hold these goods against the plaintiff, and that there is nothing to prevent her from saying so. The plaintiff is entitled to nominal damages, but I see no evidence to justify more. There will be judgment for the plaintiff for the return of the jewellery set out in the statement of claim or its value to be assessed, unless agreed, by a Master, with 40*s*. damages and the costs of the action.

Judgment for plaintiff.

Solicitor for plaintiff: *A. Ross Dagg.*

Solicitors for defendant: *Stanley Attenborough & Co.*

R. F. S.

In re AN ARBITRATION BETWEEN BECKER, SHILLAN AND COMPANY, CLAIMANTS, AND BARRY BROTHERS, RESPONDENTS. 1920 *Nov.* 11.

Arbitration—Award—Remitting to Arbitrator—Omission of Arbitrator to award Costs of Reference—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 10, *First Sch.* (*i*).

By s. 2 of the Arbitration Act, 1889, "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act. . . . ."

By para. (*i*) of the First Schedule "the costs of the reference and award shall be in the discretion of the arbitrators or umpire."

A contract for the sale of goods provided that any dispute arising out of the contract should be settled by arbitration in London in the usual way. The arbitrators and umpires to be commercial men. Disputes arose between the buyers and sellers and were referred to arbitration. The arbitration proceedings before the umpire lasted five days, counsel being employed on both sides. The umpire made an award in favour of the buyers. He also awarded that the sellers should pay the arbitrators' and umpire's fees, the costs of the shorthand notes, the hire of the arbitration room, and the legal expenses of the preparation of the award, but he made no award as to the general costs of the reference. The successful buyers moved to remit the award to the umpire :—

Held, that under the Arbitration Act, 1889, the costs of the reference were in the discretion of the umpire, and that he must therefore exercise his discretion upon them, otherwise the award was not final; that it could not be presumed that the umpire had dealt with them merely from his silence, and that therefore the award must be remitted to the umpire for him to exercise his discretion upon those costs.

Richardson v. *Worsley* (1850) 5 Ex. 613 and *Williams* v. *Wilson* (1853) 9 Ex. 90 followed.

MOTION to remit an award.

By an agreement contained in bought and sold notes, dated June 19, 1918, the claimants, Becker, Shillan & Co., agreed to sell, and the respondents, Barry Brothers, agreed to buy 1500 cases of Australian honey, at the price of 180*s.* per cwt., payment to be made by the respondents net cash against documents on presentation. The contract contained the following clause: "Any dispute arising out of this contract to be settled by arbitration in London in the usual way. The arbitrators and umpire to be commercial men." Differences arose between the parties, the claimants alleging that they were ready and willing to perform the contract and

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had tendered documents to the respondents, who had, however, repudiated the contract and refused to be bound thereby, and the claimants claimed a sum of 8045*l.* It was agreed between the parties that all the matters in dispute between them with reference to the contract should be referred to arbitration. Arbitrators were duly appointed by the claimants and respondents, and on their failure to agree an umpire was appointed. The arbitration before the umpire, who was a commercial man, lasted five days, the parties appearing by solicitor and counsel. The correspondence and documents in the case were most voluminous and intricate and involved very careful consideration.

The umpire by his award decided that the respondents were not bound to take up the goods, and that the claimants should recover nothing against them. He also awarded "that the claimants pay the fees of the arbitrators and umpire's fee, also costs of the shorthand notes, hire of arbitration room, and the legal expenses of preparation of award, which I fix at the sum of 360*l.* 5*s.* 2*d.*"

The respondents moved that the award be remitted to the umpire for reconsideration on the grounds that, except as to the cost of the shorthand notes and hire of arbitration room, he had made no award as to the costs of the reference.

Jowitt for the respondents. The award ought to be remitted to the umpire in order that he should deal with the costs of the reference. Under the Arbitration Act, 1889 (1), the costs of the reference are in the discretion of the arbitrators or umpire unless a contrary expression is expressed in the submission, which is not the case here. When costs

(1) Arbitration Act, 1889, s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission."

Sect. 10, sub-s. 1: "In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

First Sch. (*i*): "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid. . . . ."

are in the discretion of the arbitrator he must exercise his discretion upon that question and give some direction respecting them. Costs are not in his discretion in the sense that he can award on the question or not as he thinks fit. It was held in *Richardson* v. *Worsley* (1) and *Williams* v. *Wilson* (2) that an award was bad unless it dealt with all the matters referred; the costs of reference form one of the matters referred. The position in the case of a submission under the Arbitration Act, 1889, is the same as in the older cases, where the submission included an express submission as to costs. It is doubtful whether an award would now be held bad because it did not deal with costs. In *Warburg & Co.* v. *McKerrow & Co.* (3) an award was remitted to the arbitrator in circumstances similar to the present case. The Court has power to remit an award to an arbitrator under s. 10, sub-s. 1, of the Arbitration Act, 1889.

J. N. Buchanan for the claimants. The award is a final award and ought not to be remitted. An arbitrator has a discretion as to costs, so that he can even deprive a successful party of his costs. The umpire here dealt specifically with some of the costs of the reference, and therefore it is clear that he did consider them, and it must be presumed that he intended that each party should bear his own costs. The fact that the award has not specifically dealt with all the costs of the reference is no ground for saying that the umpire has not exercised his discretion upon the question of costs. The respondents ought to have obtained an affidavit from the umpire stating that he had omitted to deal with the costs of reference, and in the absence of that affidavit the Court ought not to send the award back: *In re Baxters and Midland Ry. Co.* (4) The fact that an arbitrator has made a mistake as to the legal effect of his award is no ground for setting the award aside or for referring it back to him: *Greenwood & Co.* v. *Brownhill & Co.* (5) The reason why the award was sent back in *Warburg & Co.* v. *McKerrow & Co.* (3)

(1) 5 Ex. 613.
(2) 9 Ex. 90.
(3) (1904) 90 L. T. 644.
(4) (1906) 95 L. T. 20.
(5) (1881) 44 L. T. 47.

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was because the award was ambiguous as to costs. That case is therefore no authority here.

Jowitt in reply. In *In re Baxters and Midland Ry. Co.* (1) both the parties and the arbitrator were under a misapprehension, thinking that as the arbitration was under the Light Railways Act, 1896, it was subject to the provisions of the Lands Clauses Act, 1845, under which costs follow the event, and therefore he did not make any order as to costs, whereas in fact the costs were in the discretion of the arbitrator by reason of the incorporation of the Arbitration Act, 1889. That case is therefore distinguishable.

ROWLATT J. This is a motion to remit an award to a commercial umpire upon the ground that he has not dealt with all the matters referred to him. He has awarded in favour of the respondents, the buyers, against whom the claim was made, and he has also made an award as to the costs of the award including the expenses of hiring the room and the shorthand notes. He has, however, not made any award, so it is said, with reference generally to the costs of the parties to the reference. The arbitration was an important one. It was attended by counsel on either side and it involved the examination of a number of documents. It was not a commercial arbitration depending upon the inspection of goods; it was a litigation before the umpire extending over about five days, and the costs of the reference must have been very considerable. That being so I do not think upon the terms of the award one can say that the umpire has dealt with the costs of the parties to the reference by leaving them where they fell. I think the award must be read as not having dealt with these costs at all. In these circumstances it seems to me that we are bound by authority to say that the umpire has not passed judgment upon all the matters referred to him.

The arbitration was governed by the terms comprised in the First Schedule to the Arbitration Act, 1889, which incorporated those terms in the agreement of reference. One

(1) (1906) 95 L. T. 20.

of the terms incorporated was that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire." Now, that does not mean that it is in his discretion whether he will deal with them or not, but that he must deal with them by exercising his discretion upon them. If he chooses he can say that he leaves them to be borne by the parties that incur them and make no order that either party pays the costs of the other. But he must exercise his discretion upon them. We are bound by express authority so to hold because the clause in the Schedule of the Arbitration Act, 1889, exactly reproduces the clause in the agreement of reference which formed the subject of several decisions in the Court of Exchequer culminating in the decision in *Williams* v. *Wilson*(1), where the Court of Exchequer took two months to consider the question and gave a very careful judgment by the mouth of Parke B. in the anticipation, as expressed by him, that the point might be taken to a Court of error. The decision of the Court that the award was bad as it was not final, inasmuch as it did not provide for all cases of the payment of costs, was given notwithstanding that the Court felt that a considerable hardship was involved. Parke B. in construing this clause in the reference said: "We think it clear that it was intended that he"—that is the arbitrator—"should exercise his discretion on the question of the costs, not whether he would award upon that question or not at his option or discretion." That is expressing what I have already said. Now if the matter stops there I think we are plainly bound to send this case back to the umpire, because he has not exercised his discretion upon all the matters in dispute. But Mr. Buchanan has cited the case of *In re Baxters and Midland Ry. Co.* (2), which he says precludes us from remitting this award. Now I do not think that case affects this point. It was a very peculiar case; it was an arbitration under the Light Railways Act, 1896, then a new Act. That Act provided for compensation cases being tried by arbitration, and, although the order under the Act incorporated the Lands Clauses Act, 1845, had said that the

(1) 9 Ex. 90, 99. (2) 95 L. T. 20.

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Arbitration Act should apply to any such arbitration, thereby putting the costs in the discretion of the arbitrator instead of leaving them to follow the event, as they would do under the Lands Clauses Act. In these circumstances all parties before the arbitrator thought, not unnaturally, that the costs followed the event, and the arbitrator himself was under the same misapprehension; he therefore did not deal with them, and every one was party to that mistake. That being so it was quite clear that neither party could move the Divisional Court and say that the arbitrator had not exercised his discretion as to costs when they themselves were parties to the mistake. What they did was to go to the Divisional Court and say that everybody had made a mistake, and that the award ought to go back to the arbitrator to put the matter right. The Divisional Court declined to do that, because there was no evidence of an admission by the arbitrator of his mistake and the Court could not take it from a party, but in the Court of Appeal the arbitrator himself made an affidavit and said that he had made a mistake. Neither party made any application as to costs, and he thought that as the reference was under the Lands Clauses Act the costs would follow the event. The Court of Appeal thereupon said that inasmuch as they had an admission by the arbitrator that he had made a mistake it was clear that the matter must go back to be dealt with by him in the only way which the statute authorized, and that the arbitrator must deal with the costs. Therefore I do not think that case touches this point at all. I think this award must go back to the arbitrator. Of course if he meant to leave each party to pay their own costs he can easily say so, but it must go back to him for the purpose of dealing with the costs.

McCARDIE J. I agree. The motion before us is to remit the award of an umpire in an arbitration between certain claimants, Becker, Shillan & Co. and the respondents, Barry Brothers. The claimants and the respondents agreed to submit to the umpire all matters in dispute between them with reference to a contract for the sale of a large quantity of

Australian honey. No express reference to costs was made in the submission between the parties. The arbitration proceeded and occupied five or six days. The correspondence which was put in was very voluminous. Counsel were employed by both sides and the costs were therefore very heavy. The claim was a large one, because it was for over 8000*l.* The umpire has made his award, and in his award he dealt with certain costs —namely, his personal costs together with the costs of the arbitrators, the cost of the shorthand writer, who no doubt had supplied him with a copy of his notes, the hire of the room and the legal expenses of the award—in other words, he dealt with the minor or personal costs of the reference, but with the more serious matter of the costs of the parties he did not deal at all. The respondents were successful, and the claimants recovered nothing against them at all. The respondents now seek to have the award remitted to the umpire in order that he may consider whether or not the respondents ought to receive their costs. The ground upon which the award is sought to be remitted is that an award if it is to be valid must deal with all the matters that are referred. The point taken by Mr. Jowitt for the respondents is that the umpire has failed to carry out that requirement. As I have said, the submission did not expressly refer to the question of costs, but this was a submission within s. 2 of the Arbitration Act, 1889, and that section provides that a submission shall, unless a contrary intention is expressed therein, be deemed to include the provisions set forth in the First Schedule to the Act. The First Schedule says in the last paragraph that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire." The result is that the terms of that schedule must be read into the submission between the parties here. Now if that be done, it is, as my brother has pointed out, at once obvious that the old decisions of the Court of Exchequer apply, because in *Richardson* v. *Worsley* (1) the parties in their written submission stipulated that the costs of the agreement, and of the reference and award, should be in the discretion of the

(1) 5 Ex. 613.

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arbitrator. The arbitrator in his award failed to deal with the costs. Upon that ground it was held by a strong Court that the award was bad. A similar view was taken by an equally strong Court in *Williams* v. *Wilson* (1), where upon words substantially similar to those in the former case Parke B. said: "We think it clear that it was intended that he should exercise his discretion on the question of the costs," and inasmuch as his discretion was there not exercised so as to provide for all cases of the payment of costs it was held that the award was not valid. It seems to me that the principle of those cases must apply here unless Mr. Buchanan can satisfy us that the umpire has dealt with the costs of the reference. In my view it would be most unsatisfactory to infer from his silence that he had dealt with them. It is clear that prima facie the successful respondents were entitled to get their costs; they had incurred great expense and defeated a claim for 8000*l.* Can it be supposed that the umpire is entitled to deprive them of costs by mere silence as to costs? I cannot so think. In my view it is reasonably clear that the umpire has not here dealt at all with the question of the successful respondents' costs. It was suggested that we were precluded from remitting this case because of the decision in *In re Baxters and Midland Ry. Co.* (2) In my view that case is obscure in its results; at all events it only decides that the Court of Appeal in that case, upon an affidavit by the arbitrator himself that he had made a mistake, thought that they should remit the matter for his consideration upon the question of costs. The mistake in that case had been a general mistake; all parties believed that the proceedings would be governed by the Lands Clauses Act, 1845, and not by the Arbitration Act, but in my view that decision in no way negatives the power of the Court to remit upon other grounds, and it is to be observed that the points which have been submitted here by Mr. Jowitt—that is, the points based upon s. 2 of the Arbitration Act, 1889, and the cases of *Richardson* v. *Worsley* (3) and *Williams* v.

(1) 9 Ex. 90, 99. (2) 95 L. T. 20.
(3) 5 Ex. 613.

Wilson (1)—were not presented to the Court of Appeal at all. In my view *Baxters' Case* (2) is a case which is special in its circumstances. I should like to add that the older authorities which were referred to by Mr. Buchanan are well treated by Moulton L.J. in that case where he said (3) in referring to them: "The reported decisions of the Court"—the cases referred to are those of *Greenwood & Co.* v. *Brownhill & Co.* (4) and *Allen* v. *Greenslade* (5) which I need not discuss in detail—"only show the principles which have guided the Court from time to time in exercising its jurisdiction, and though they may afford a valuable guidance they do not restrict either the jurisdiction of the Court in deciding other cases or the duty of the Court to look at the facts in each particular case." Then he added: "In the present case I think that in the interests of justice we ought to send the matter back to the arbitrator." For the reasons I have given I think that, in the interests of justice, this matter should be referred back to the umpire to decide this question of costs as a matter of judicial discretion. In my view it is reasonably clear that we are justified in remitting this award under the provisions of s. 10, sub-s. 1, of the Arbitration Act, 1889, and in doing so we incidentally approve of the view taken by Walton J. in *Warburg* v. *McKerrow.* (6)

Award remitted.

Solicitors for claimants: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

(1) 9 Ex. 90.
(2) 95 L. T. 20.
(3) Ibid. 23.
(4) 44 L. T. 47.
(5) (1875) 33 L. T. 567.
(6) 90 L. T. 644.

R. F. S.

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Nov. 18.

NESOM *v.* METCALFE.

Committal—Judgment Debt—Order for Payment by Instalments—Default—Jurisdiction to Commit—Evidence of Debtor's Means—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

Where judgment has been recovered in the High Court for a sum of money, and an order is afterwards made in the county court under s. 5 of the Debtors Act, 1869, for payment of the judgment debt by instalments, the instalment order, and not the original judgment, is the governing order for the purpose of the jurisdiction of the Court under s. 5 to commit the debtor for non-payment of any of the instalments. On an application, therefore, for a committal order there must be evidence that the debtor has at that time, or has had since the date of the instalment order, the means to pay the unpaid instalments and has refused or neglected to pay the same.

Per McCardie J. The evidence that the debtor has means must be of a reasonably direct character.

Appeal from Roche J. at chambers refusing a writ of prohibition.

In May, 1918, Nesom (hereinafter called "the creditor") obtained judgment in the High Court against Metcalfe (hereinafter called "the debtor") for 146*l.* The judgment being unsatisfied, the creditor, in January, 1920, took out a judgment summons against the debtor in the county court of Yorkshire at Leyburn. That summons came before the county court judge on several dates, and on July 12 he made an order for payment of the judgment debt of 146*l.* by instalments of 10*l.* a month. The debtor not having paid two instalments, the creditor on October 8 took out another judgment summons, which was heard by the judge on November 8. On that date, according to the affidavit filed on behalf of the debtor, the creditor did not attend, but was represented by his solicitor; no evidence was given on behalf of the creditor as to the debtor's means; the debtor stated on oath that he had not the means to pay; whereupon the judge made an order committing the debtor to prison for forty-two days, stating that he was satisfied at the hearing of the previous judgment summons that the debtor could pay.

In his notes, the judge, after referring to the judgment in the High Court, said that the only question he had to answer was whether the debtor then had, or had had "since the date of the judgment," the means to pay the sum in respect of which he had made default, and had refused or neglected to pay the same, and on the evidence he answered that question in the affirmative. That evidence was to the effect that the debtor had previous to the date of the judgment in the High Court stated that the farm which he was cultivating, although the tenancy agreement was in his father's name, was his own, and that he had said so when applying in 1916 for exemption from military service. The judge added that at one of the earlier hearings of the judgment summons the debtor stated "that he was working for his father on the latter's farm for his food and clothes and no more, and at the final hearing his solicitor stated that he had married within the past month and was now getting 10*s.* a week from his father. The debtor could now earn in his own district 5*l.* or 6*l.* a week as a farm foreman or steward."

An application having been made in chambers for a writ of prohibition directed to the county court judge and the creditor to prohibit them from further proceeding in the matter of the committal of the debtor on the ground that the judge had no jurisdiction to make the order in the absence of evidence that the debtor had on the date of the committal, or had had since the date of the instalment order on July 12, the means to pay the debt, Roche J. dismissed the application.

The debtor appealed.

Whitmore Richards for the debtor. The jurisdiction of the Court to make a committal order in respect of the non-payment of debt rests upon s. 5 of the Debtors Act, 1869. (1)

(1) Debtors Act, 1869, s. 5: "Subject to the provisions hereinafter mentioned, ... any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court: Provided . . . . . .

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Where, as in this case, there has been an instalment order, that order, for the purpose of the jurisdiction to commit, supersedes the original judgment, and as each instalment becomes a separate debt, for default in payment of which a separate order of commitment may be made: *Evans* v. *Wills* (1), it is clear that on an application to commit for non-payment of a particular instalment there must be evidence that the debtor has the means to pay it and that the failure to pay it is due to his contumacy. That the instalment order supersedes the original judgment is also clear from *Montgomery & Co.* v. *De Bulmes* (2), which decided that so long as the instalment order is in force execution cannot be issued on the original judgment: see also *Woodham Smith* v. *Edwards* (3), where Buckley L.J. pointed out that in such a case there is no longer a present debt for the amount of the original judgment but merely a debt accruing due by so much a month. In *Dillon* v. *Cunningham* (4) Kelly C.B. after stating that an order for payment by instalments may be made without any proof of means, added that "afterwards, when an order for commitment is applied for, it will be time to show the existence of means." There must therefore be evidence showing that the debtor then has, or has had since the date of the instalment order, the means to pay the unpaid instalments. In this case the judge erroneously considered that if there was any evidence that since the date of the original judgment the debtor had had means that entitled

(2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules

. . . . . .

For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments. . . . ."

(1) (1876) 1 C. P. D. 229.
(2) [1898] 2 Q. B. 420.
(3) [1908] 2 K. B. 899, 905.
(4) (1872) L. R. 8 Ex. 23.

him to make a committal order. Further, the evidence upon which the judge purported to act was not evidence of means. Affirmative evidence of ability to pay was necessary: see the observations of Jessel M.R. in *Chard* v. *Jervis*. (1)

Harold Morris for the creditor. The county court judge was right in taking the High Court judgment as the governing judgment for the purpose of the committal order. Sect. 5 of the Debtors Act speaks of default having been made by the debtor in the payment of any debt or instalment due from him in pursuance of "any order or judgment," that is, in this case, the original judgment. Proviso 2 to the section is still referring to the same "order or judgment." Here, default was made in paying the amount due under the judgment of the High Court; and the creditor's only remedy was by judgment summons in the county court and the machinery of an instalment order, but that order is not the "order or judgment" mentioned in the section. Even assuming, however, that this view of the section is erroneous, the judge had evidence entitling him to make the committal order. If in such a case there is a real conflict of testimony upon some fact which goes to the question of jurisdiction this Court will not interfere: per Cockburn C.J. in *Elston* v. *Rose*. (2) Here there was a real conflict of testimony as to the debtor's means. Prohibition, therefore, ought not to go.

Whitmore Richards in reply. In *Reg.* v. *Brompton County Court Judge* (3) Lord Coleridge C.J. points out that where an instalment order has been made it becomes the effective order for the purposes of s. 5: see also the observations of the Court of Appeal in the same case. That decision makes it clear that the expression "order or judgment" in the section is not limited to the original judgment.

ROWLATT J. In this case judgment was obtained against the debtor in 1918 for 146*l*., and on July 12, 1920, an order was made by the county court judge for payment of that sum by instalments. On November 8, 1920, a further

(1) (1882) 9 Q. B. D. 178. (2) (1868) L. R. 4 Q. B. 4, 7.
(3) (1886) 18 Q. B. D. 213, 216.

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judgment summons having been taken out against the debtor who had failed to pay two of the instalments, a committal order was made against him. It is said on behalf of the debtor that that order was made without jurisdiction. The order of committal recites that there was a judgment or order of July 12 for the payment of 146*l.* Nothing is there said about instalments, but it is obviously reciting the instalment order, and the sum of 146*l.* is only mentioned as the aggregate of the instalments. It then continues, "Whereas the [debtor] has made default in payment of 20*l.* payable in pursuance of the said judgment or order,"—that means the instalment order—"and whereas a summons was . . . . duly issued out of this Court," requiring the debtor to appear personally "to be examined on oath touching the means he had then or had had since the date of the said judgment or order to satisfy the sum then due and payable in pursuance of the said judgment or order," it then, after reciting that "whereas at the hearing of the said summons, it has now been proved to the satisfaction of the Court that the [debtor] now has or has had since the date of the said judgment or order the means to pay the sum due and payable in pursuance of the said judgment or order . . . . " orders the committal of the debtor. That committal order in reciting "the said judgment or order" clearly is referring to the instalment order of July 12; and it is in the correct form if s. 5 of the Debtors Act, 1869, means that when a man has a judgment summons against him for not paying an instalment he is not to be committed unless he has had the means to pay since the date of the instalment order. In this case it appears from the judge's notes that the question which he tried, and as a result of which he has committed the debtor, was not whether the debtor had means since the instalment order, but whether he had means since the date of the original judgment. In my opinion that cannot justify the committal of the debtor. In the circumstances of this case the debtor can be committed only if there was evidence that since the instalment order he had had means.

Mr. Morris for the creditor argued very acutely that in

the second proviso to s. 5 of the Debtors Act, which says that the jurisdiction to commit to prison "shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same," the expression "order or judgment" means the original order or judgment and not the instalment order. I cannot accept that contention. The first part of the section enacts that a person may be committed to prison "who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment." Therefore an instalment of a debt may be due in pursuance of an "order or judgment." An instalment order is therefore within that expression. This I think is borne out by the authorities. *Evans* v. *Wills* (1) decided that the penalty by way of committal is applicable to each instalment. *Montgomery & Co.* v. *De Bulmes* (2) decided that when an instalment order has been made and is in force execution cannot be issued upon the original judgment. *Woodham Smith* v. *Edwards* (3) decided that in such a case there could be execution outside the Debtors Act for each instalment. These decisions all point strongly to the conclusion that it is the instalment order that must be regarded for this purpose, not the original judgment. Lastly, in *Reg.* v. *Brompton County Court Judge* (4) it was said that where there is an instalment order the committal order must be in respect of the non-payment of an instalment. Lord Coleridge C.J. there said (5): "The effective order here is that ordering 4*l.* a month. Since that order there has been no inquiry before the county court judge as to whether the debtor had the means of paying the instalment for which this commitment issued." If an instalment order and a committal order can be made at the same time, and an instalment is not paid, the judge is depriving himself

(1) 1 C. P. D. 229.
(2) [1898] 2 Q. B. 420.
(3) [1908] 2 K. B. 899.
(4) 18 Q. B. D. 213.
(5) Ibid. 216.

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of the power to do what is his duty—namely, to hear the debtor and ascertain whether he has the means to pay the instalment before committing him. That is in substance what was said by the Lord Chief Justice. In the same case Lord Esher said (1) that the Court "had no jurisdiction to commit in any case unless it was proved that the debtor could have obeyed the order by payment, and that when the order was for payment by instalments that doctrine would apply to each separate instalment." Lindley L.J. said (2) "it has long been settled law that a judge cannot at the same time make an order for payment by instalments and for committal in default. The reason for this is obvious. The Legislature required an investigation of the debtor's means of payment before making an order for his imprisonment." That means that if imprisonment is ordered for non-payment of an instalment the judge must inquire why he has not paid that instalment. Lopes L.J. gave judgment to the same effect. Upon the ground therefore that there has been no inquiry as to the debtor's means to pay the two instalments in question I think the appeal must be allowed and the writ must go. The question has been argued whether the evidence before the county court judge would have justified the committal if the judge had addressed his mind to the proper question, but in my opinion it is unnecessary to express any opinion upon that point.

McCARDIE J. Roche J. refused an order for prohibition directed to the creditor in the action and to the county court judge, hence this appeal. The creditor obtained judgment in the High Court against the debtor in May, 1918. At the beginning of 1920 the creditor took out a judgment summons in the county court of Yorkshire, and after several adjournments the judge made what is called an instalment order for payment of the debt at the rate of 10*l.* per month. The debtor did not pay, and in October the creditor took out a summons asking that the debtor should be committed, and on November 8 the judge directed that the debtor should be

(1) 18 Q. B. D. 217. (2) Ibid. 228.

committed to prison for non-payment of the instalments. I think it is clear that the judge acted upon the view that the relevant question for him to decide was whether or not the debtor had means to pay since the date of the judgment in May, 1918, and that on being satisfied that he had had means since that date a committal order could be made. That view of the county court judge is to be tested by a consideration of the terms of s. 5 of the Debtors Act upon which alone the judge's power rests. It must be remembered that s. 5 is a penal section exposing a debtor to imprisonment for non-payment of debt. I fully appreciate the cogent argument of Mr. Morris upon the wording of the section, and if the matter stood free from authority the argument might carry conviction to this Court, but the section must be construed in the light of the decisions given upon it. It is clear that the judge could make an order for payment by instalments: see *Dillon* v. *Cunningham.* (1) Having made that order, what was its effect? That matter has been considered in several cases. In *Montgomery & Co.* v. *De Bulmes* (2) it was held that after an instalment order has been made execution cannot be issued upon the original judgment; and *Woodham Smith* v. *Edwards* (3) decided that after an instalment order is made execution can only issue for the amount of instalments which have become due and are unpaid. The case of *Evans* v. *Wills* (4) indicates that where an instalment order has been made and there has been an omission by the debtor to pay, a committal order may be made on proof of that default. The effect of those decisions is to make the instalment order the governing order for the purpose of exercising the power to commit. This view accords with that taken in *Reg.* v. *Brompton County Court Judge.* (5) Therefore it is impossible to accede to Mr. Morris's argument as to the effect of the section. The result of the decisions, particularly *Reg.* v. *Brompton County Court Judge* (5), is that the question to be determined, where an

(1) L. R. 8 Ex. 23.
(2) [1898] 2 Q. B. 420.
(3) [1908] 2 K. B. 899.
(4) 1 C. P. D. 229.
(5) 18 Q. B. D. 213.

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instalment order has been made, is whether the debtor, at the time of the application to commit him, has, or has had since the date of the instalment order, the means to pay the amount he was bound to pay under that order. That is the true principle to apply. It is clear that in this case the county court judge did not apply it, and upon that ground the prohibition should go.

In my opinion there is another ground upon which the writ should be granted. The county court judge had several hearings before he made the instalment order, but when he made the committal order on November 8 he had no evidence at all upon which he could properly make it. In my view he was not entitled to rely upon evidence which had been given in prior proceedings in the absence of some affirmative evidence of the debtor's means given at the hearing before him on November 8. Such a requirement is in my opinion essential if the language of s. 5 is to be observed—namely, that the jurisdiction to commit can be exercised only where it is proved to the satisfaction of the Court that the person making default either has or has had the means to pay the sum in respect of which the order was made. That means that evidence of a reasonably direct character is required before this punishment for non-payment of debt can be imposed: see *Chard* v. *Jervis*. (1)

On both grounds therefore I think the writ must go.

Appeal allowed.

Solicitors for debtor: *J. & C. Dodd, for P. F. C. T. Crow, Sunderland.*

Solicitors for creditor: *Bell, Brodrick & Gray, for A. H. Wilkinson, Leyburn.*

(1) 9 Q. B. D. 178.

J. S. H.

COLLIS *v.* FLOWER AND ANOTHER.

1920
Nov. 18.

Landlord and Tenant—Dwelling House—Recovery of Possession—"Tenant"—Executor not in actual occupation—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 *Geo.* 5, *c.* 97), *s.* 1, *sub-s.* 3; *s.* 2, *sub-s.* 1 (*d*).

Sect. 2, sub-s. 1 (*d*), of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (now re-enacted by s. 12, sub-s. 1 (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) provides that the expression "tenant" includes "any person from time to time deriving title under the original tenant."

The tenant of a dwelling house, which came within the scope of the Increase of Rent Restriction Acts, died. By her will she appointed the defendant F. her executor, and the defendant O., who had resided in the house with her, residuary legatee. After the death of the tenant O. continued to reside in the house. The landlord by notice to quit served upon F. required possession to be given up, and as possession was not given on the expiration of the notice, proceedings were commenced against both defendants, who claimed the protection of the Increase of Rent Restrictions Acts. The county court judge held (1.) that there was no assent by F., as executor, to O. taking the tenancy in part satisfaction of her rights as residuary legatee and that she was not the tenant of the house; and (2.) that as F. was not in occupation of the house he could not claim the protection of the Acts:—

Held, that F., as executor, was tenant of the house within the meaning, and was entitled to the protection, of the Acts, although he was not in occupation of the house.

APPEAL from Greenwich County Court.

The plaintiff claimed possession of a house which, till her death in April, 1919, was held by a Mrs. Campbell at a yearly rent of 38*l*. Under the will of Mrs. Campbell, the defendant Flower was executor, and the other defendant, Miss Offen, residuary legatee. The defendant Miss Offen, who had resided with Mrs. Campbell, continued in occupation of the house in question after Mrs. Campbell's death. Notice to quit was served upon the defendant Flower to give up possession of the house at Christmas, 1919, and as possession was not given to the plaintiff this action was commenced. The defendants claimed protection under the Increase of Rent and Mortgage Interest (War Restrictions) Acts. At the hearing in the county court it was contended for the defendants that Miss Offen was tenant of the house

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on the ground that the defendant Flower, as executor, had assented to her taking the tenancy in part satisfaction of her rights as residuary legatee; alternatively, that the defendant Flower, as executor, was the tenant of the house. The judge found as a fact that there had been no assent by the defendant Flower to the defendant Miss Offen taking the tenancy, and therefore that, not being a tenant, she was not entitled to the protection of the Rent Restriction Acts; while with regard to the claim that the defendant Flower was tenant, the judge held that as he was not in occupation of the house he could not take advantage of the Rent Restriction Acts. The judge accordingly made an order for possession.

The defendants appealed.

J. L. Crouch for the defendants. By the Rent Restriction Acts protection is given to the tenants of dwelling houses where the rent does not exceed the amount specified. The house in question in this case is, by reason of the rent, within the Acts, and the question is, was there a tenant of the house entitled to claim protection? Either Flower or Miss Offen was the tenant. It is submitted that there was evidence to show that Flower assented to Miss Offen taking the tenancy, but if the county court judge's finding against that contention is to be taken as a decision of fact, then Flower is clearly the tenant as coming within s. 2, sub-s. 1 (*d*), of the Act of 1915, which defines "tenant" as including any one deriving title under the original tenant. The view of the county court judge that the Acts only protect tenants in actual physical occupation is erroneous, for s. 1, sub-s. 1 (*b*), of the Increase of Rent, &c. (Amendment), Act, 1919, contemplates that the tenant may not be in actual occupation of the house. The effect of the county court judge's decision is that immediately on the death of Mrs. Campbell there was no tenant of the house.

Maurice Healy for the plaintiff. The county court judge found as a fact that there was no assent by the executor

to Miss Offen taking the tenancy. It must be taken therefore that Miss Offen was not the tenant of the house. With regard to Flower, no doubt the tenancy passed to him under Mrs. Campbell's will, but not being in occupation of the house he cannot claim the protection of the Rent Restriction Acts, which clearly were intended to apply only to persons in actual occupation of dwelling houses. That this is so is clear from the provision of s. 1, sub-s. 1 (*c*), of the Increase of Rent, &c. (Amendment), Act, 1919, that the Court, when asked for an order for possession, must consider (inter alia) the alternative accommodation available for the tenant, and the question of alternative accommodation can only arise in the case of a tenant who is in actual occupation.

Crouch in reply. The argument for the plaintiff ignores the definition of "tenant" in s. 2, sub-s. 1 (*d*), of the Act of 1915.

ROWLATT J. In my opinion this appeal must be allowed and judgment entered for the defendants. The house in question was occupied under a tenancy agreement by a Mrs. Campbell who died in April, 1919. By her will Mrs. Campbell appointed the defendant Flower her executor and the defendant Miss Offen her residuary legatee, and a question much debated in the county court was whether by reason of anything that passed between Flower, as executor, and Miss Offen, he assented to her taking the tenancy of the house in part satisfaction of her rights as residuary legatee. The county court judge held that there was no assent of that kind, and I have no right to question his decision upon that point, that being a question of fact. Assuming, however, that there was no assent by the executor to the defendant Miss Offen taking the tenancy, who was the tenant of this house after the death of Mrs. Campbell? The tenant can only be Flower as executor, or, possibly, Miss Offen, not as residuary legatee, but as a mere tenant at will under Flower. Some one must have been tenant of the property having regard to the fact that the

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term "tenant" in the Rent Restriction Acts includes any person deriving title under the original tenant, and Flower and Miss Offen had all Miss Campbell's interest. Therefore, one or other of them was tenant. The county court judge has held that Miss Offen was not, and I am not prepared to quarrel with that. With regard to Flower, however, the county court judge has held that he was not tenant, because, in his view, the Acts only apply to a tenant who is in occupation. I do not agree. In this case, on the view of the facts that I am assuming, Miss Offen was in occupation as representing Flower, and while it may be that the Acts cannot be invoked to protect the financial position of a mesne lessor, Flower really is the tenant if Miss Offen is not. The mere fact that Flower is executor cannot exclude the operation of the Acts, because they cannot mean that if a lessee dies every one then in the house, the widow and children, for example, can be turned out merely because the interest in the lease has passed to the executor who is not in physical occupation of the house. Taking it, therefore, that Miss Offen was not the tenant of this house, Flower clearly was the tenant, and, as such, he is entitled to the protection of the Acts.

McCARDIE J. I agree. Until her death Mrs. Campbell was tenant of a dwelling house at a rent of 38*l.* per annum. The house therefore was during her lifetime clearly within the provisions of the Rent Restriction Acts. Mrs. Campbell died in April, 1919. By her will she appointed the defendant Flower her executor, and the other defendant, Miss Offen, her residuary legatee. In May, 1919, notice to quit was given to Flower as executor to give up possession in December, 1919. He did not give up possession, and this action was commenced in which the only point of substance raised for the defence was that the case came within the Rent Restriction Acts. The county court judge decided in favour of the plaintiff, holding that the Acts had no application to the facts. I am unable to see upon what foundation the judge rested his judgment. The draftsman

of these Acts, which deal with the rights of tenants for short or prolonged periods, obviously must have contemplated that there must be many transmissions of title by death, and I gather that the county court judge has taken the view that transmission of title by death deprives the owner of the transmitted title of any protection whatever under the Acts unless he is in actual occupation. I cannot think that can be right, and in my opinion s. 2, sub-s. 1 (*d*), of the Act of 1915 was intended to cover such a case as this. That provides that "the expressions 'landlord,' 'tenant' . . . . include any person from time to time deriving title under the original landlord, tenant. . . . ." It was suggested by Mr. Healy in his able argument for the plaintiff that the scheme of the Acts is only to protect tenants in actual physical occupation of the premises. I do not agree. There is nothing in the language of the Acts to justify that view; on the contrary, as was pointed out by Mr. Crouch, the Increase of Rent, &c. (Amendment), Act, 1919, contemplates by s. 1, sub-s. 1 (*b*), that protection is given, although the tenant may not be in occupation. That clause provides that so long as certain conditions are fulfilled no order for recovery of possession shall be made unless "the tenant, by sub-letting the dwelling house or any part thereof, ... is making a profit which, having regard to the rent paid by the tenant, is unreasonable, and the Court considers it reasonable to make such an order." That could only have been drafted on the assumption that the tenant has gone out of possession, and sub-let the house or part of it. I think, therefore, that the Acts apply in the circumstances of this case. That the executor gets his title from the original tenant is clear, and I take it that the rule is that, upon the death of a person, his tenancies, whether long or short, vest fully and at once in his executor from the moment of the death. It seems to me that Flower, as executor, was a person who in the full sense derived title from Mrs. Campbell within s. 2, sub-s. 1 (*b*), of the Act of 1915, and therefore, accepting the finding that there was no assent by him to Miss Offen taking the tenancy in part

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satisfaction of her rights as residuary legatee, he was the tenant of the house and, as such, entitled to the protection of the Acts.

Appeal allowed.

Solicitors for plaintiff : *Shaw & Son.*
Solicitor for defendants : *E. F. Debenham.*

J. S. H.

1920
Oct. 13.

PERCIVAL AND ANOTHER *v.* PETERBOROUGH CORPORATION.

Acquisition of Land—Assessment of Compensation—Arbitration—Evidence of previous Offer to purchase—Admissibility—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *sub-s.* 3.

The proviso to s. 2, sub-s. 3, of the Acquisition of Land (Assessment of Compensation) Act, 1919, which declares that "any bona fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration," is not limited to such cases of special suitability or adaptability of the land for any purpose as come within that sub-section, but is of general application.

In an arbitration under that Act between a landowner and a local or public authority desirous of acquiring the land as a site for a building scheme the official arbitrator is bound under that proviso to admit in evidence and take into consideration any bona fide offer for the purchase of the land, made before the passing of the Act, which may be brought to his notice, notwithstanding :

that the case is not one in which the land has a special suitability or adaptability for any purpose coming under s. 2, sub-s. 3 ; or

that the offer was not made in the open market in the ordinary way of business, but was made by the said authority with a view to the acquisition of the land for its said scheme ; or

that the agreement resulting from the offer was a conditional agreement, which owing to the non-fulfilment of the condition became null and void.

CASE stated under the Acquisition of Land (Assessment of Compensation) Act, 1919.

The City Council of Peterborough, the respondents, having prepared a housing scheme which was approved by the Ministry of Health, desired to acquire certain land belonging to Messrs.

Percival and another, the appellants, as a site for carrying out the scheme.

They first negotiated for the purchase of the land by agreement. They made an offer for it which was subsequently increased, and the increased offer was accepted by the appellants, the offer and acceptance not being stated to be without prejudice. A provisional agreement for carrying out the bargain was entered into between the parties which provided (inter alia) that if the Local Government Board or other Government authority should not by July 6, 1919, make an order confirming the purchase the agreement should be null and void. No order of that kind was made on that date or afterwards in pursuance of the agreement, and on July 12, 1919, the town clerk of the respondents wrote to the claimants that the agreement must become void, as the respondents had found it impossible to obtain the order.

The respondents then obtained an order of the Ministry of Health for the compulsory acquisition of the land, and served notice to treat upon the appellants. On August 19, 1919, the above-mentioned Act received the royal assent and became operative, and the respondents applied for and obtained the appointment of an arbitrator under that Act to assess the compensation.

On May 27, 1920, the matter was heard by the arbitrator.

Counsel for the appellants proposed to call evidence as to the offer to purchase made by the respondents and the other negotiations between the parties before the passing of the Act and as to the provisional agreement, contending that s. 2, sub-s. 3, of the Act (1) applied to an offer made by the

(1) Acquisition of Land (Assessment of Compensation) Act, 1919:—

"An Act to amend the law as to the Assessment of Compensation in respect of Land acquired compulsorily for public purposes. . . . ."

"2. In assessing compensation, an official arbitrator shall act in accordance with the following rules:—

(1.) No allowance shall be made on account of the acquisition being compulsory:

(2.) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: . . . ."

"(3.) The special suitability or adaptability of the land for any purpose shall not be taken into

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acquiring authority in the course of a negotiation for a purchase by agreement before the passing of the Act or the service of a notice to treat, and that the arbitrator could not refuse to admit the evidence.

It was argued on behalf of the respondents that, since, owing to the condition as to sanction of the Local Government Board or other authority not having been complied with, the agreement had become null and void, the negotiations of which it was the result were also null and void and the evidence with regard to them must be refused.

The arbitrator was of opinion that the standard of value established by the Act was that of market value to a willing seller, and therefore that s. 2, sub-s. 3, could not be interpreted to apply to an offer made by the acquiring authority in the circumstances above stated, or to any offer which was not made in the market in the ordinary way of business, because offers made in the former circumstances could not be taken as evidence of the true market value of the land, it being notorious that such offers especially before the passing of the Act were affected by considerations other than the amount of the market value, and particularly by the desire to avoid the expense, uncertainty, and delay involved in settling the question of value by arbitration, and the payment of compensation for forced sale, and that such amounts were frequently fixed by a compromise of the conflicting views of the several members of a council or committee; that to admit evidence of that kind would be contrary to the practice in such cases before the Act was passed; and that it would be highly inexpedient, unless the provisions of the Act made it obligatory on an arbitrator to do so, to admit evidence as to negotiations previously carried on by the parties with a view to settlement

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account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: Provided that any bona fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration. . . . ."

by agreement, because to do so would tend to check negotiations of that sort, and make it more difficult to avoid arbitration. On these grounds the arbitrator refused to admit the evidence.

Jeeves K.C. (*Theobald Mathew* with him) for the appellants. The arbitrator was wrong in refusing to admit in evidence the offer to purchase the land made by the respondents before the passing of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The proviso to s. 2, sub-s. 3, of the Act (1) directs that the arbitrator shall take into consideration any bona fide offer for the purchase of the land made before the passing of the Act which may be brought to his notice. Unless good reason can be shown for construing it otherwise, that proviso must be construed according to the plain and natural meaning of its language. In view of the generality of its terms it cannot be limited to offers for the purchase of land made in the cases coming within the body of sub-s. 3—namely, cases in which the land has a special suitability or adaptability for certain purposes. Neither can the proviso be restricted, as the arbitrator appears to have thought it could, to offers for the purchase of land made in the open market. The arbitrator in effect, without sufficient ground for doing so, read into the proviso after the word "offer" the words "by a person other than a public authority." The intention of the proviso is to give the arbitrator a wider discretion than he would otherwise have had, and to enable him to admit evidence of any bona fide offer to purchase the land made before the passing of the Act.

E. G. Palmer for the respondents. The arbitrator rightly refused to admit the alleged offer in evidence.

There was no offer within the meaning of the proviso to s. 2, sub-s. 3, of the Act of 1919 (1), or at all, which could have been admitted in evidence by the arbitrator. The agreement entered into between the parties before the passing of the Act contained a clause providing that if a Government authority should not by a given date confirm the agreement, it should

(1) See note (1) ante, p. 415

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be null and void. No Government authority confirmed the agreement before that date which was anterior to the arbitration proceedings, and, consequently, before these proceedings took place the agreement and every part of it including the offer had become null and void. Alternatively, by reason of its containing that clause, which prevented the price and other terms from being fixed in the meantime, the agreement and every part of it including the offer were not absolute but merely provisional.

The proviso to s. 2, sub-s. 3, is not of general application, but is limited to the cases coming within that sub-section. Sect. 2 provides that in assessing compensation under the Act an official arbitrator shall act in accordance with the rules set out in the sub-sections. None of the sub-sections is of general application, but each of them deals with a very specific subject matter. Sub-sect. 3 in effect provides that the special suitability or adaptability of the land for any purpose may be taken into account, except in certain cases, one of these being that in which the land has no market value apart from the needs of a local or public authority. The proviso to that sub-section is limited to the cases of special suitability or adaptability to which the sub-section applies, and is subject to the exceptions which it specifies, and it is only under these restrictions that it enables the landowner to give evidence of any previous bona fide offer to purchase the land. The fact that the proviso speaks of a "bona fide" offer shows that it cannot be referring to an offer by a local or public authority. Unless the Legislature had intended that the proviso should be limited to s. 2, sub-s. 3, it would not have been annexed to that sub-section. If the intention had been that the proviso should be of general application, or even that it should be applicable to all the sub-sections of s. 2, it would not have appended the proviso to sub-s. 3 of that section, but would have added it as a separate sub-section at the end of it. Sect. 5, sub-s. 1, of the Act would seem to show that it is only an unconditional offer in writing that the official arbitrator is required to take into account. In this case the proviso to s. 2, sub-s. 3, prevented the arbitrator from taking into

consideration the previous offer to purchase the land that had been made by the respondents.

THE EARL OF READING C.J. The respondents, the Corporation of Peterborough, desired to acquire certain land belonging to the appellants for carrying out a housing scheme. The respondents made an offer to purchase the land, which was accepted by the appellants, and the parties entered into an agreement in writing by which, if a Government authority should not by July 6, 1919, by order confirm the purchase, the agreement should be null and void. No such order was in fact made and the agreement accordingly became null and void. The respondents next took proceedings for the compulsory acquisition of the land and served notice to treat upon the appellants. The Acquisition of Land (Assessment of Compensation) Act, 1919, was then passed, and an official arbitrator was appointed under that Act to assess the compensation. At the hearing before the arbitrator, the appellants tendered in evidence the offer to purchase made by the respondents before the passing of the Act, which, it must be assumed for this purpose, was a bona fide offer. The arbitrator refused to admit the evidence, and it is contended on behalf of the appellant that he ought to have admitted it. If, without treating the evidence as inadmissible in law, the arbitrator by reason of the circumstances and of his own special knowledge and experience had attributed little or no value to it, there can be no question that he could not be said to have acted wrongly. The arbitrator, however, rejected the evidence, because he decided that strictly as a matter of law it was inadmissible.

The question and the only question before us is whether or not the arbitrator was right in so doing. Our decision of this question must rest entirely upon the language of the Act. We have to construe its language and thereby come to a conclusion as to the intention of the Legislature. Sect. 2 provides that in assessing compensation the official arbitrator shall act in accordance with certain specified rules which are there set out as sub-sections. Sub-sect. 1 provides that no

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allowance shall be made on account of the acquisition being compulsory. Sub-sect. 2 provides that the value of the land shall, subject as thereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realize. Sub-sect. 3, which contains the rule now under discussion, deals with the case in which the land has a special suitability or adaptability for some purpose, and, after providing that that shall not be taken into account in certain circumstances, adds the proviso which is the subject of the present argument and is as follows: "Provided that any bona fide offer for the purchase of the land made before the passing of this Act, which may be brought to the notice of the arbitrator, shall be taken into consideration."

Counsel for the respondents, who has argued the case with singular ability and placed every consideration before us which could possibly influence us in favour of his clients, has urged, in the first place, that the alleged offer was inadmissible in evidence under the proviso to s. 2, sub-s. 3, of the Act, because the agreement entered into between the parties in pursuance of the offer before the passing of the Act having been subject to the approval of a Government authority and that approval never having been given, the agreement and every part of it was absolutely null and void. In my judgment the answer to that contention is that the proviso does not say that any bona fide "agreement," but that any bona fide "offer," shall be taken into consideration, and it seems to me to be immaterial that the agreement following upon the offer was made subject to an approval which was not given, or that it has otherwise become null and void. An offer, I assume, was made by the respondents, and if so it may be given in evidence in this arbitration, unless some good reason be shown to the contrary.

The second contention of counsel for the respondents, which is in reality his main contention, is that, even if an offer was in fact made by the respondents, it was not an "offer" within the meaning of the proviso, inasmuch as the proviso on its true construction is limited to cases which come under that sub-section only. Having regard to its very

wide language, I am unable to accept that restricted view of the proviso. There seems to me to be nothing unreasonable in assuming that the Legislature intended by these words that if there has been a bona fide offer for the purchase of the land, upon which the official arbitrator is adjudicating, made before the passing of the Act, then on that offer being brought to the notice of the arbitrator, he shall take it into consideration. I think the words of the Act are sufficiently wide to make it incumbent upon the arbitrator to admit the evidence of the earlier offer.

I therefore come to the conclusion that the arbitrator was wrong in forming the impression which he apparently did form, that for the special reasons which he gives he ought not to attribute any value to an offer made in the circumstances set out in the special case, and that he ought as a matter of law to rule that the evidence was inadmissible. In the present case I think that the arbitrator was bound to take the offer into consideration.

As I have already indicated, the arbitrator is not bound to give effect to the evidence of the offer. The proviso does not require him to act upon the offer but only to take it into consideration. It is, I suppose, some evidence of what was then thought to be the value of the land. Presumably the arbitrator would treat the offer as having been made under conditions totally different from those that now exist and at a time when the restrictions imposed by this Act upon the acquisition of land and the payment of compensation therefor by a local or public authority did not apply, and he would take it into account or not as he pleased. I desire to repeat that nothing that I have said is intended to indicate that the arbitrator is bound to act upon the evidence of the offer. I am much struck by the reasoning which impressed the arbitrator in this case with the small value which in the circumstances it may turn out ought to be attributed to such an offer. The question of the weight of the evidence is a question of fact for the arbitrator with which we have no concern. The only question for this Court is the question of law as to the admissibility of the evidence.

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For these reasons, I think the case must go back to the arbitrator in order that he may admit the evidence of the offer and take it into account.

DARLING J. I entirely agree.

AVORY J. I am of the same opinion. I think that in this case the arbitrator has mistaken the question of the weight of the evidence for the question of the admissibility of the evidence in law. It was the former question only with which he was here concerned. While s. 2, sub-s. 3, of the Act provides that the arbitrator is not to take into account the special suitability or adaptability of the land for the purposes only of a local or public authority, I am satisfied by the argument to which we have listened that the meaning of the proviso in question, specially inserted as it is in that sub-section, is that he is to take into consideration the fact that an offer has been made by the local authority for the purchase of the land before the passing of the Act.

Case remitted.

Solicitors for appellants: *Bridges, Sawtell & Co.*, for *Percival & Son, Peterborough.*

Solicitors *for* respondents: *Chamberlain & Co., for W. T. Mellows, Town Clerk, Peterborough.*

J. R.

MORIARTY *v.* REGENT'S GARAGE AND ENGINEERING COMPANY, LIMITED.

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Dec. 6, 7, 8.

Company — Director — Remuneration — "Salary" — Apportionment — Implied Term — Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 5.

In November, 1919, the plaintiff agreed to sell his business to the defendant company, the payment to be partly in cash and the balance in debenture stock of the company. The agreement contained a clause providing "that the vendor shall be, and act as, one of the directors of the said company, and that his fees for so acting shall be 150*l.* per annum." The plaintiff received the debentures, which contained a condition entitling the company at any time to give notice of their intention to pay them off at the expiration of six months. In December, 1919, the plaintiff was duly appointed a director to hold office so long as he held a certain amount of debentures in the company. Disputes having arisen between the plaintiff and the company, the plaintiff agreed to accept payment of all money due to him upon his debentures, and on May 14, 1920, the debentures were paid off, and thereupon he ceased to be a director. In an action by the plaintiff to recover a proportionate part of the 150*l.* as his fees for the period from December, 1919, to May, 1920, when he acted as director, the deputy county court judge gave judgment for the defendants, holding that the plaintiff was not entitled to remuneration for a broken part of a year. On appeal:—

Held, that as the plaintiff had an express contract with the defendants that he should receive 150*l.* per annum for his services as director, he was in receipt of a "salary" within the meaning of the Apportionment Act, 1870, and that the salary was apportionable.

In re Central De Kaap Gold Mines (1899) 69 L. J. (Ch.) 18 and *In re London and Northern Bank; McConnell's Claim* [1901] 1 Ch. 728 disapproved.

Salton v. *New Beeston Cycle Co.* [1899] 1 Ch. 775 distinguished.

Swabey v. *Port Darwin Gold Mining Co.* (1889) 1 Megone, 385 commented on.

Held, further, that, apart from the Apportionment Act, 1870, a term should, in the circumstances, be implied in the contract that a proportionate part of the remuneration should be paid if the plaintiff's services as director terminated during a broken period of a year.

County Court — Special Defence — Claim for apportioned Sum — Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 3 — *County Court Rules, Order* x., *rr.* 10, 18.

Sect. 3 of the Apportionment Act, 1870, which provides that an apportioned part of rent or other payment shall be recoverable when the next entire portion shall have become due, and not before, establishes a statutory defence within the meaning of rr. 10 and 18 of the County Court Rules, so that if a defendant intends to rely thereon he must give notice as required by the rules.

APPEAL from Clerkenwell County Court.

The plaintiff claimed 61*l.* 12*s.* as director's fees for the period from December 16, 1919, to May 14, 1920.

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By an agreement dated November 19, 1919, made between the plaintiff and one Elliott, acting on behalf of a company about to be incorporated as the Regent's Garage and Engineering Co., Ld., the plaintiff agreed to sell, and Elliott to purchase, the goodwill and stock in trade of the plaintiff's business as a motor-cab proprietor. Clause 3 provided that payment was to be partly in cash and 5000*l.* in first mortgage debenture stock of the company; and the company was to pay off 2000*l.* of the debentures within two years of December 1, 1919. Clause 4 was in these terms: "The vendor agrees to accept the balance of the purchase money, namely 5000*l.*, in such debenture stock as aforesaid, and it has also been agreed that the vendor shall be, and act as, one of the directors of the said company, and that his fees for so acting shall be 150*l.* per annum."

The company was duly incorporated. It adopted the above agreement, and the plaintiff received four debentures, one for 2000*l.* redeemable on December 1, 1921, and three for 1000*l.* each redeemable on December 1, 1924. All contained a condition entitling the company at any time to give notice to the holder to pay them off at the expiration of six months from the date of the notice.

Art. 78 of the articles of association provided that the qualification of a director should be the holding of 1000 ordinary shares or debentures of the company securing the aggregate principal sum of 2000*l.*

At the first meeting of the defendant company's board on December 19, 1919, the plaintiff was appointed a director to hold office so long as he held a certain amount of debentures of the company.

Disputes arose between the plaintiff and the other directors. Ultimately the plaintiff agreed to accept from the company payment of all money due upon his debentures, and on May 14, 1920, the debentures were paid off, and the plaintiff thereupon ceased to be a director. He thereupon brought this action in respect of his fees for the period during which he acted as director.

The deputy county court judge held that the action failed.

He considered that he was bound by authority to decide that the plaintiff was not entitled to remuneration for the broken part of the year during which he had acted as director.

The plaintiff appealed.

Cartwright Sharp for the plaintiff. Directors' remuneration is a "salary" within the Apportionment Act, 1870 (1), although it is true that the decided cases appear to be against this contention.

[McCARDIE J. In those cases some confusion has arisen (1.) from the fact that judges have overlooked the Apportionment Act, and (2.) from the misreport of *Swabey* v. *Port Darwin Gold Mining Co.* (2)]

Yes. In that case it is said in the statement of facts that the directors' remuneration was to be "at the rate of" so much per annum, whereas it has been ascertained that there was to be a lump sum to be divided amongst the directors: see Palmer's Company Precedents, 11th ed., Part I., p. 726. But there was no misapprehension upon this point in the judgments, and the case, when properly regarded, is in the plaintiff's favour. In *Salton* v. *New Beeston Cycle Co.* (3) there was no question of salary, but of the division of a lump sum among the directors, so that the Apportionment Act did not apply. In *In re Central De Kaap Gold Mines* (4) the remuneration was so much "per annum," and therefore the facts were different from those in *Salton* v. *New Beeston Cycle Co.* (3), which it professed to follow. The Apportionment Act was not there brought to the attention of Wright J. In *Inman* v. *Ackroyd & Best* (5), in which attention was first judicially called to the misreport of *Swabey* v. *Port Darwin Gold Mining Co.* (2), a lump sum was divisible among the directors. In *In re London and Northern Bank; McConnell's*

(1) Apportionment Act, 1870, s. 2: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income . . . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Sect. 5. "In the construction of this Act . . . . the word 'annuities' includes salaries and pensions."

(2) (1889) 1 Megone, 385.

(3) [1899] 1 Ch. 775.

(4) 69 L. J. (Ch.) 18.

(5) [1901] 1 K. B. 613.

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Claim (1), Wright J. again followed *Salton* v. *New Beeston Cycle Co.* (2), and, again, the Apportionment Act was not referred to in the judgment. Different views are entertained by the text-book writers regarding the apportionability of directors' remuneration: see Buckley's Companies Acts, 9th ed., p. 621, and Palmer's Company Precedents, 11th ed., Part I., p. 726.

[LUSH J. referred to *Lowndes* v. *Earl Stamford.* (3)]

That was decided under the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), the wording of which was different from that of the present Act.

[MCCARDIE J. referred to *In re London and Northern Bank; Mack's Claim.* (4)]

That case is not in point, as there the judge found that the service had not been broken. It is submitted that the plaintiff's remuneration is apportionable, and that the cases in conflict with this contention were wrongly decided.

[MCCARDIE J. referred to *Treacy* v. *Corcoran.* (5)]

That supports the view now contended for that the director's remuneration in a case like this is apportionable. The argument now advanced does not involve the proposition that if a director were to be dismissed for misconduct he would be entitled to claim a proportionate part of his fees.

Secondly, apart from the Act altogether and taking into consideration the whole of the circumstances, the Court ought to imply a term that a proportionate part of the remuneration should be paid if the plaintiff's service as director terminated during a broken period of a year. The provision in the debentures authorizing the company to pay them off at the expiration of six months clearly points to the necessity of implying a term in the plaintiff's agreement to the effect now contended for.

Hilbery for the defendants. First, clause 4 of the agreement considered by itself, and apart from the Apportionment Act, 1870, shows that the parties have bargained for the payment

(1) [1901] 1 Ch. 728.
(2) [1899] 1 Ch. 775.
(3) (1852) 18 Q. B. 425.
(4) [1900] W. N. 114.
(5) (1874) I. R. 8 C. L. 40.

to the plaintiff of 150*l.* in respect of service by him for a definite term—namely, a whole year. Less service than one complete year, therefore, does not entitle him to recover anything. The principle of *Cutter* v. *Powell* (1) applies. As has recently been reiterated, parties must be held strictly to their bargains, and the Court will not imply a term unless it is driven to the conclusion that the parties must have intended that it should be implied: see *In re Comptoir Commercial Anversois & Power Co.* (2); *Hamlyn* v. *Wood.* (3) No ground exists here for supposing that the parties intended that a term should be implied in this contract that the plaintiff, if he served for less than a year, should receive a proportionate part of the 150*l.*

Secondly, does the Apportionment Act, 1870, apply? It is submitted that it does not. Reliance is placed by the plaintiff upon the word "salaries" that occurs in the Act; but a director's emoluments do not constitute a "salary," for the use of that word connotes the idea that the person receiving it is a servant. A director of a company is not a servant: *Dunston* v. *Imperial Gas Light & Coke Co.* (4); per Bowen L.J. in *Hutton* v. *West Cork Ry. Co.* (5); *Hopkinson* v. *Newspaper Proprietary Syndicate* (6); and his remuneration is not apportionable: see Buckley's Companies Acts, 9th ed., p. 621.

[LUSH J. If your argument is right, *Treacy* v. *Corcoran* (7) was wrongly decided.]

There it was conceded by counsel that the salary of a Clerk of the Crown came within the terms of the Apportionment Act, 1870, and the Court had not to examine the point. That case cannot be considered to be an authority. Moreover, there was there the relationship of master and servant, the Crown being the master. Here the company was not the master of the plaintiff. *In re Central De Kaap Gold Mines* (8)

(1) (1795) 6 T. R. 320.
(2) [1920] 1 K. B. 868, 879, 899.
(3) [1891] 2 Q. B. 488.
(4) (1832) 3 B. & Ad. 125.
(5) (1883) 23 Ch. D. 654, 672.
(6) [1900] 2 Ch. 349.
(7) I. R. 8 C. L. 40.
(8) 69 L. J. (Ch.) 18.

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and *In re London and Northern Bank; McConnell's Claim* (1) support the defendants' contention.

[In re *Anglo-Austrian Printing, &c., Union; Isaacs' Case* (2) was referred to.]

Thirdly, even assuming that the Apportionment Act, 1870, applies to a director's remuneration, this action was premature, for s. 3 of the Act shows that an apportioned part is recoverable only when the entire sum would have been payable, and not before.

[McCARDIE J. That point does not appear to have been taken in the county court, and, moreover, it constitutes a statutory defence of which notice should have been given. It is not therefore open on this appeal.]

Cartwright Sharp in reply. There is no ground for limiting the word "salaries" in the Apportionment Act, 1870, to remuneration payable to servants in the strict sense. Payments to members of Parliament are called "salaries," but members of Parliaments are not servants.

Dec. 8. LUSH J. [after stating the facts continued:] The plaintiff's claim that he is entitled to an apportioned part of the 150*l.* under clause 4 of his agreement is put upon two grounds—first, that the Apportionment Act, 1870, applies; and secondly, upon the contract itself, apart from the Apportionment Act.

It is contended for the plaintiff that the payment of 150*l.* a year reserved under the agreement is a "salary" within ss. 2 and 5 of the Apportionment Act, 1870, and if it is not a "salary" it is at all events a periodical payment in the nature of income within the Act. In order to see what the word "salary" includes as used in the Act I think it necessary to consider the provisions of the earlier Apportionment Act, that of 1834 (4 & 5 Will. 4, c. 22), s. 2 of which, so far as material, was as follows: "All rents charge and other rents, annuities, pensions, dividends . . . . and all other payments of every description . . . . made payable or coming due at fixed periods under any instrument . . . . shall be apportioned

(1) [1901] 1 Ch. 728. (2) [1892] 2 Ch. 158.

so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends . . . . or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, ... and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively . . . . including the day of the death of such person, or of the determination of his or her interest." The word "salary" is not mentioned, but the word "pensions," which in the Act of 1870 is to be deemed to be included in the word "annuities," is specifically mentioned. In *Lowndes* v. *Earl Stamford* (1) it was decided that the salary of an auditor and superintending manager of an estate holding office during the joint lives of the employer and himself, was not a payment apportionable under the Act of 1834. The short ground of that decision was that the office which the plaintiff held was not a public office and that the Act did not apply to offices of that kind. That case was decided in 1852. In 1870 the present Apportionment Act was passed, which introduced, obviously with a view of remedying what was considered a defect in the earlier Act, the word "salaries," so as to enable a salaried officer who held an office which was not a public office to obtain the benefit of the Act. Those being the circumstances under which the Act of 1870 was passed, the first question we have to decide is, what does the word "salary" mean as used in the Act? For the defendants it has been contended that the word "salary" must be construed as a sum paid by a man to his servant, that it is like wages, although the term "salary" is generally used with reference to persons occupying what I may call a somewhat higher grade than that of persons in receipt of "wages"; and that the plaintiff, by virtue of his office of director of a limited company, was not a servant

(1) 18 Q. B. 425.

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of any master, and therefore that his emoluments, if I may use that neutral expression, did not constitute a "salary" within the meaning of the Act. For the plaintiff it has been argued that that is far too restricted a meaning to put upon the word "salary"; that it does not connote the relation of master and servant in the ordinary sense; that any one who holds office and is in receipt of a sum of money which is paid to him as remuneration for the services he renders in that office is a person in receipt of a "salary" within the meaning of the Act. Those are substantially the contentions of the parties.

I do not propose to attempt to define the word "salary." It is really incapable of definition. If one were asked to distinguish between "salary" and "wages" one would be asked to attempt an impossible task. No hard and fast line can be drawn between the two. One has, of course, a general idea of what the one means in contradistinction to the other; but, as was illustrated by a recent case before the Railway and Canal Commission, it is not easy to distinguish between the two. Several of the large railway companies have two classes of funds which are distributable among their officers and servants: a superannuation fund, and a general pension fund. One is distributable among the salaried officers and the other among the wage-earning servants of the company. The clerical staff, which is very large, embraces persons in receipt of very large salaries and also persons receiving comparatively small wages. An artificial line has to be drawn between the two. The only way to deal with a question of this kind is to say whether in any particular case the payment made to a person who renders services fairly comes within the word "salary" as used in the Apportionment Act, 1870. The question arose in the Irish case of *Treacy* v. *Corcoran*. (1) There the plaintiff, who had been Clerk of the Crown for Queen's County, and who resigned office in the middle of a half year, was held entitled to recover from the defendant, his successor, as money had and received, an apportioned part of the half year's salary which had been paid to the

(1) I. R. 8 C. L. 40.

defendant. Monahan C.J. quotes the sections of the Act of 1870, and accepts as correct the assumption that had been made that the salary paid to the holder of that office was apportionable. There the plaintiff was not the servant of a master in the ordinary sense; he was a servant of the Crown; he filled an office and by virtue of holding it he received certain emoluments. The Court treated the emoluments as "salary." It is true to say that a director is not a servant of any master; he is not so much a servant as the Clerk of the Crown was, because the latter might well be described as a servant of the Crown, whereas a director cannot be described as a servant of the company or of any one. There is undoubtedly that distinction. At the same time, the director renders services, although he is not, strictly speaking, a servant, and the income he receives is undoubtedly paid to him, in this case where there is an agreement such as the one before us, as remuneration for his services. Other cases were put in the course of the argument which illustrate the difficulty of defining what the word "salary" as used in the Act means. The case of members of Parliament who receive 400*l.* a year under a resolution of the House of Commons in 1911 was mentioned. Members of Parliament are not the servants of any one or in any sense; they are the representatives of their constituents, but I should be slow to say that what they receive is not apportionable. A director is not in the same position; he holds an office in respect of which he renders services. It is interesting to note that a director of a company has, in more than one case, been spoken of as if he were a servant and his emoluments referred to as a salary. In *Swabey* v. *Port Darwin Gold Mining Co.* (1), which was an action brought by a director against the company, Lord Esher M.R. said: "It would be absurd to hold that one of the parties to a contract could alter it as to service already performed under it. The company has power to alter the articles, but the directors would be entitled to their salary at the rate originally stated in the articles up to the time the articles were altered." In

(1) 1 Megone, 385, 387.

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In re Anglo-Austrian Printing and Publishing Union ; Isaacs' Case (1) Stirling J., whose judgment was adopted in the Court of Appeal, said this (2) : "I think, then, that where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors." Stirling J. certainly appeared to treat the director as a person serving the company ; another way of saying that he was a servant.

On the other hand, we have had several cases cited which, it is said, show that a director cannot properly be called a servant, and that it cannot be said of him that he is in receipt of a salary. In *Hutton* v. *West Cork Ry. Co.* (3) Bowen L.J. said : "But what is the remuneration of directors ? I think it is pretty clear that like the compensation for loss of the services of the managing director, it is a gratuity. A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, that he is to have a right to be paid for it." If a director, for all purposes and in all cases, only receives a gratuity, that sum might still in some cases be a periodical payment in the nature of income within the meaning of the Act, but it is not necessary to say that. Bowen L.J. was dealing with the position of a director, as such, and pointing out that qua director he was not receiving a salary but merely a gratuity—for it is to be remembered that a director often is, and I think still more often was, paid fees, so much for each attendance, or what was still more often the case, received no fixed amount but a portion of a lump sum according to a resolution, passed at the end of the year, dividing the lump sum among the directors. In the absence of a contract such as the one now before us no one would suggest that a

(1) [1892] 2 Ch. 158. (2) Ibid. 164.
(3) 23 Ch. D. 654, 671.

director is in receipt of a salary. This is the case where a director has made a contract by which he is to receive a fixed sum, not subject to any resolution of the board, and not depending upon the number of board meetings he attends. The views of Bowen L.J. are in those circumstances irrelevant to the case we have to decide. Again, in *Hopkinson* v. *Newspaper Proprietary Syndicate* (1), it is said to have been held that a director is not a servant. But, again, that is irrelevant to the present case, because all that the Court had to decide was whether a director was a clerk or servant within the meaning of the Preferential Payments in Bankruptcy Act, 1888. It cannot be said from that decision, that a director is not in receipt of a salary within the meaning of the Apportionment Act.

In my opinion, therefore, looking at the authorities, considering the language of the Act, having regard to the object of the Legislature in amending the law and in introducing the word "salaries," the plaintiff was in receipt of a "salary," which, prima facie, is apportionable.

I turn to another difficulty which is suggested. It is said that a director holds a peculiar office, and, moreover, that when it is agreed, as in this case, that the director is to receive so much "per annum," that indicates that only when the year is complete and when he has served the whole year—if I may use the expression "served"—is anything payable to him. It is said that where it is intended that he should receive an apportioned part of his yearly remuneration the proper words are that he shall be paid "at the rate of" so much per year, and that those words are not to be found in this contract. No doubt that view has received substantial support in text-books, but different views have been taken with regard to the point. Cases have been cited to us on the matter with which it is necessary to deal; but, before coming to them, I wish to say this. If a person has expressly contracted that he will not claim remuneration for a broken part of a year, and is only to be paid if and when the whole year has been completed, the Apportionment Act will not

(1) [1900] 2 Ch. 349.

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help him. That Act, which was passed to remedy a grievance, undoubtedly affected common law rights and obligations. For example, among the payments dealt with by the Act are rents. Rents are payable under a contract, and inasmuch as before the Act a person in receipt of so much rent could not claim a proportionate part of the whole sum if anything happened during the year, half year or quarter as the case may be, and inasmuch as the Act provides that the rent shall be considered as accruing from day to day, it altered the contract. So, too, when the word "salaries" was introduced. There can be no doubt that if the Apportionment Act operates to confer upon the recipient of the salary the right to receive something which he would not otherwise have had the right to receive, it alters the incidents of the contract; but it does not follow that if a person has expressly contracted that he will only claim the rents or the salary as the case may be if and when the year has been completed the Apportionment Act operates to give him a right which he has expressly agreed not to have. The Act is satisfied and its objects are completed if it gives to a person who has a right to rent or salary the right to receive an apportioned part, provided that is consistent with the express terms of the contract. If it is inconsistent, no one would suggest that the Act would apply. Take another case: supposing a servant were dismissed for misconduct during the currency of a quarter or half year, as the case may be. It is not necessary to decide whether the servant can, by virtue of the Apportionment Act, claim an apportioned part of his salary up to the day of his dismissal or at all events up to the day of the discovery of the misconduct; but I should hesitate to agree with the suggestion that he can claim in such circumstances. It is quite true that the salary is to be considered as accruing from day to day, and it is quite true that a dismissed servant is entitled to salary that has already accrued at all events up to the date of the act of dishonesty, but the Act does not say that in such a case, or for all purposes, the salary shall be deemed to have accrued from day to day; it only says that it shall be considered as accruing from day

to day. That provision was merely inserted to facilitate or to extend the apportionment which the Legislature was saying should be made. The sum cannot logically be apportioned unless it is treated as accruing from day to day; it is only for that purpose that it is deemed to accrue from day to day. If something has happened during the service which forfeits the right to the salary it may well be that the servant cannot take advantage of the Act and say: "The salary has accrued from day to day and I am entitled to receive it."

In this case the parties have not expressly contracted that the salary shall not be apportioned. All that the agreement says is that for so acting the plaintiff shall receive 150*l.* per annum, and it leaves the question whether the Apportionment Act applies to the statute itself. Dealing with the case upon that footing does the Act apply, assuming that the plaintiff is a person in receipt of a "salary" within the meaning of the Act? Several cases have been cited with which it is necessary to deal. *Swabey* v. *Port Darwin Gold Mining Co.* (1) is said to be a direct authority for the proposition that the salary is apportionable. I cannot express a view as to the effect of that decision for the reason that the report is such a singularly unfortunate one. The reporter begins by making a very serious mistake in his quotation from the company's articles of association. The report says that under the articles "the remuneration to be paid to the directors was to be at the rate of 200*l.* per annum." If it had been so, the remuneration would clearly have been apportionable. But the articles of association in *Swabey's Case* (1) did not say that the directors' remuneration was to be "at the rate of 200*l.* per annum"; they said that the directors were to be paid 200*l.* a year. This was pointed out in *Inman* v. *Ackroyd & Best.* (2) Again, the reporter states that Stephen J. decided in favour of the company and from that decision the plaintiff appealed. We do not know what the judge said, and inasmuch as Lord Halsbury in his judgment says that he agrees with one part of the judgment and disagrees with

(1) 1 Megone, 385. (2) [1901] 1 K. B. 613.

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the other it is not possible to say with what Lord Halsbury was agreeing and with what he was disagreeing. Again, the report sets out no arguments, and we do not know whether the case turned upon the Apportionment Act or not. By reason of these defects one cannot say whether it is an authority in favour of the present plaintiff or not.

The next case to which I desire to refer is *Salton* v. *New Beeston Cycle Co.* (1)—a decision of Cozens-Hardy J. That turned upon the construction of articles of association which differed from the articles in this case. In another respect also it differed from this case—namely, in the fact that in this case there was a contract in writing between the parties, whereas there was not in the *Salton Case.* (1) Here we have to deal with the express contract, not with the articles of association. Cozens-Hardy J. was dealing with articles of association which did not provide that the directors should each be entitled to receive so much a year as does this contract; they provided that the board should be entitled to receive by way of remuneration in each year 5000*l.* Upon these articles, Cozens-Hardy J. said this (2): "Against this it was urged that at the utmost only one year's remuneration could be claimed, and that there is no apportionment in respect of an incomplete year. This seems to me to be right. Art. 81 does not give remuneration at the rate of 5000*l.* a year, but only provides that the board shall be entitled to receive by way of remuneration in each year 5000*l.* I see no ground for extending this language or for holding that any remuneration can be claimed except for a complete year." In my opinion a decision which turned upon articles containing entirely different language from that to be found in the contract with which we are concerned cannot be relied upon as any guide in construing this contract.

In the next case, *Inman* v. *Ackroyd & Best* (3), the point again turned upon articles of association, which provided that the directors should be paid out of the funds of the company by way of remuneration for their services "the sum of 125*l.*

(1) [1899] 1 Ch. 775. (2) [1899] 1 Ch. 779.
(3) [1901] 1 K. B. 163.

per annum, per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination equally." The action was by a director, who had resigned after serving for a part of a year, to recover remuneration in respect of his services during that period, and it was held that the articles did not entitle him to recover remuneration for any less period than a year. The Court approved the decision in *Salton* v. *New Beeston Cycle Co.* (1) and distinguished *Swabey* v. *Port Darwin Gold Mining Co.* (2) That case, however, does not appear to bind or guide us, because there the Court treated the sum which the directors were to receive as a lump sum, and, of course, if there is a lump sum to be divided as the directors determine, it is plain that the circumstances are wholly different from those in a case where the director has made an express contract that a certain fixed sum shall be paid to him per annum.

The two cases that present most difficulty are *In re Central De Kaap Gold Mines* (3) and *In re London and Northern Bank ; McConnell's Claim.* (4) Both these cases were decided by Wright J., and it is upon his judgments that the present defendants mainly or to a large extent rely. *In re Central De Kaap Gold Mines* (3) turned upon the true construction of articles of association, which provided that "the directors shall be paid out of the funds of the company as follows—namely, a sum of 150*l.* per annum to the chairman ; and a sum of 100*l.* per annum to each ordinary director . . . . by way of remuneration for their ordinary services." Wright J. held that the fees were for a whole year's services, and were not apportionable. Before referring to the judgment I will state what the circumstances of the other case, *McConnell's Claim* (4), were. The articles of association upon which the decision turned provided that the directors were to be paid out of the funds of the company by way of remuneration

(1) [1899] 1 Ch. 775.
(2) 1 Megone, 385.
(3) 69 L. J. (Ch.) 18.
(4) [1901] 1 Ch. 728.

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300*l.* per annum; they further stated how the office of director was to be vacated. The director in question absented himself without leave during a certain period and then received a written notice from the board stating that he had ceased to be a director pursuant to the articles. The company went into liquidation, and the director claimed remuneration from the date of his appointment until the winding up. It was held that the claim failed, as the remuneration was not due until the end of a year and was not apportionable. In the earlier of these two cases, it seems to me that Wright J. treated *Salton* v. *New Beeston Cycle Co.* (1) as governing the case before him. He said (2): "If the case before me were the case which was before Cozens-Hardy J. in *Salton* v. *New Beeston Cycle Co.* (1) I should think there would be no doubt, as Cozens-Hardy J. held, that nothing could be claimed, and there could be no apportionment. But the language in the present case is different from that used in either of those cases. At first I was inclined to think it allowed apportionment, but after further consideration I think that is not the right construction of the article, and that it really means a sum for the entire year. One strong argument in favour of this view is that it is not likely the article means that if a director serves for a few days or a week he is to be paid de die in diem. Unless it means that, I cannot help thinking it means a whole year's service. The time of service of a director is not of continuously equal value. If he serves during a part of the year in which no important business is done it may be of no value. I have some doubt, but that is my opinion. The consequence is that the application must be dismissed." In *In re London and Northern Bank; McConnell's Claim* (3), Wright J. said (4): "According to a decision of my brother Cozens-Hardy in *Salton* v. *New Beeston Cycle Co.* (1) which I have followed in more than one instance under an article worded as this article is"—Wright J. was no doubt referring to *In re Central De Kaap Gold Mines* (5)—"there is no room for apportionment

(1) [1899] 1 Ch. 775. (2) 69 L. J. (Ch.) 18, 19.
(3) [1901] 1 Ch. 728. (4) [1901] 1 Ch. 732. (5) 69 L. J. (Ch.) 18.

or for treating the matter as one of quantum meruit." He was really saying that *Salton* v. *New Beeston Cycle Co.* (1) was in point, and he followed it. In so far as he expressed a view of his own he expressed it with some doubt, and in those circumstances I do not think that we can properly say that we are bound by those judgments. With the greatest respect for the judgments of Wright J., if it is open to me to express my own view, I should have come to a different conclusion. Moreover we are here concerned with circumstances which were not the same as those before Wright J. Here we have an express contract in which the plaintiff has stipulated for so much a year, without any qualification, as remuneration for his services, and in consideration of the sale of his business to the company. If the cases to which I have just referred are out of the way the point appears on these facts, perhaps not altogether free from doubt but reasonably clear; and assuming that the plaintiff was in receipt of a " salary " I come to the conclusion that there is nothing in this contract which amounts to a stipulation on the part of the company that until, or unless, the plaintiff serves for a whole year he is not to receive anything. The case falls within the class where either rent is payable or salary eo nomine is payable to an actual servant and there is no express stipulation against apportionment. The Apportionment Act therefore applies, and the plaintiff is entitled to recover an apportioned sum unless there is some other obstacle in his way.

This brings me to notice the formidable contention that the plaintiff has brought his action too soon. This contention is based upon s. 3 of the Apportionment Act, 1870, which is in these terms : " The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would

(1) [1899] 1 Ch. 775.

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have been payable if the same had not so determined, and not before." If that point had been open to the defendants it would probably have been fatal to the plaintiff's case. The point involved a statutory defence which could not be relied upon unless notice of it was given; and no notice was in fact given. I think therefore that both because the point was not taken in the county court, and because no notice of it as a statutory defence was given under Order x. of the County Court Rules, it cannot now be relied upon.

I come now to the last point. It was urged on behalf of the plaintiff that, apart from the Apportionment Act, the contract itself, when looked at in the light of the surrounding circumstances, shows that the parties contracted that an apportioned sum should be payable if the plaintiff ceased to be a director during a year. It is obvious that we not only may but must look at the surrounding circumstances in order to construe the contract; and the surrounding circumstances that one may look at are these: Who are the parties, what was their position at the time the contract was made, and what was the subject matter of the contract? The surrounding circumstances throw a great deal of light upon clause 4. The plaintiff was the owner of a valuable business. He was bargaining with the company through their trustee for the sale of the business and he was stipulating for certain advantages and benefits to himself. In addition to the cash and debentures that he was bargaining for he stipulated that he should, when the company was formed, become one of the directors and should receive a certain fixed sum of 150*l.*—a sum for which, no doubt, he was to render services. The receipt of 150*l.* a year was one of the advantages he was to get; one of the matters which went to make up the total consideration in exchange for the business with which he was parting. That was the position of the bargaining parties. What was the subject matter and what was the position in regard to the circumstances under which the remuneration might cease to be payable? The debentures provided that they might be paid off by the company on giving six months' notice. Looking at the form of the debentures and the

contract itself it is clear that both the parties bargained with this fact patent to them that the plaintiff might serve for eleven months and just before the end of a year the company should have it in their power to disqualify him after he had rendered his services for that broken period. Those were the circumstances under which the contract was negotiated. It is said that the debentures were not settled then. That may be, but the form was known, and it was known that the power of the company to vacate this office existed and would exist. When two parties make an agreement in those circumstances, and one is to receive 150*l.* a year as a director and the other can make him vacate his office by giving six months' notice to pay off the debentures," it appears to me necessary to imply a term that a proportionate part of the sum shall be paid if the service is determined before the end of the year, or to say that that was what the parties contemplated, that that is what the words "150*l.* a year mean. For this purpose *Swabey* v. *Port Darwin Gold Mining Co.* (1) is directly relevant, because there Lord Halsbury, after pointing out that the company could determine the service, said (2): "There was, therefore, a reciprocal right to put an end to the service at an earlier period than the end of the year. It follows from that as a necessary consequence, that both parties must have contemplated that as this was a service for hire and reward, a proportionate part of the remuneration agreed upon should be paid if the service was determined at an earlier period than the full year." That passage is directly applicable to the facts of this case. I gave this illustration during the argument: many schools, instead of asking a medical man to attend each boy who may be ill, pay a doctor so much per annum to attend the boys when necessary, and for this he gets fees exactly in the same way as the plaintiff in this case gets fees under clause 4. Suppose the proprietor of the school and the doctor were making a contract that the fees should be so much a year. Can any one suppose that the parties would contemplate that if the proprietor of the

(1) 1 Megone, 385. (2) Ibid. 386.

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school stopped the service at the end of the eleventh month or if the doctor died at the end of the eleventh month, he or his estate should receive nothing for the service rendered during the eleven months? They must have contemplated that payment should be made for a proportionate part. If any one had asked the proprietor of the school when the contract was negotiated, "Do you really contemplate that you can stop the service at the end of the eleventh month and so get the advantage of the doctor's attendance during eleven months without having to pay for it?" the proprietor would say, "Of course I did not contemplate such a thing; the amount will be apportionable." Both on the authority of *Swabey* v. *Port Darwin Gold Mining Co.* (1) and on the circumstances of the case itself it seems to me plain that the parties contemplated that this 150*l.* a year should be apportionable. It may not be possible to give a logically correct answer to the question, "Why do you infer a term in one case and not in all?" It all comes back to the question, how far is one convinced from the circumstances of the case that the parties must have intended that that consequence should follow? It could always be said in the illustration I gave of the doctor attending a school that if he wished to be paid for a broken period he should have inserted a term to that effect in the contract, but it does not follow as a matter of law that because he did not do so the Court will not imply such a term. I am quite conscious that the trend of decisions has been in favour of restricting the cases in which a term should be implied, just as it has been in favour of restricting the operation of the ejusdem generis rule. The current of authority has been in favour of tying parties to their contracts. I recognize and that it is only in extreme cases that one should that, imply a term, but I imply it here, and in doing so I am supported by the authority of *Swabey* v. *Port Darwin Gold Mining Co.* (1)

For these reasons I think, with all respect to the deputy judge (1) who had not the benefit of the full and able

(1) 1 Megone, 385.

argument which has been addressed to us, that this claim ought to have succeeded. The appeal will therefore be allowed.

McCARDIE J. This appeal raises a question of substantial importance. It involves a review of several well-known decisions. The deputy county court judge held that the plaintiff was not entitled to recover either upon the terms of the contract or under the Apportionment Act, 1870. That Act, which is wide in its wording, speaks in s. 2 of "annuities, dividends, and other periodical payments in the nature of income," and by s. 5 the word "annuities" is defined as including "salaries and pensions." Both words "salaries" and "pensions" are susceptible of very wide meaning. The Act gives no definition of either. Sect. 7 says that "the provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place." Therefore, to exclude the operation of the Apportionment Act in cases to which otherwise it would apply an express stipulation is required between the parties. The only case in which the Act has been applied to salaries is *Treacy* v. *Corcoran*. (1) That case is of interest, but it was there conceded that the Apportionment Act applied and that the salary of the plaintiff, who was a Clerk of the Crown in Ireland, fell within the Act. The only point for decision by the Court was whether or not there was a contractual privity between the plaintiff and the defendant. As has been pointed out, counsel and the Court assumed that the Act applied to the salary there in question, which was not the salary of a servant in the ordinary sense of the word. What is the meaning of the word "salary"? Before I consider that, however, I venture to point out that the Apportionment Act, 1870, was intended to remedy an obvious injustice in the case of a man, whether an annuitant or what not, who died a short time perchance before the money was actually payable to him. He or rather his representatives got nothing. It is well to recognize that the Act of 1870 followed upon an earlier Act, and was meant to remove many cases of hardship.

(1) I. R. 8 C. L. 40.

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Under the earlier Act the word "salary" was not mentioned, and it is upon that point that *Lowndes* v. *Earl Stamford* (1) turned, because there the plaintiff was a servant of the defendant; he held no public office, but had only a private salary from a private person. It was held that his salary did not fall within the wording of the Apportionment Act, 1834. One of the objects which the enlarged wording of the Act of 1870 was intended to effect was to get rid of the injustice created by the decision in *Lowndes* v. *Earl Stamford*. (1) The Act of 1870 therefore treated "salary" in the definition clause as one of its subject matters. The Act has been applied in the widest possible manner, as is shown in the authorities collected in Chitty's Statutes, vol. i., pp. 393–4. Now comes the question what is a "salary"? I agree that the word is difficult to define. I may refer to two statutory provisions, the first in s. 33 of the Bankruptcy Act, 1914, which provides for preferential payments in bankruptcy. Many decisions have been given on that section or the similar section in previous statutes, but those cases must all be read in the light of the words used in the section, "the wages or salary of any clerk or servant"; and therefore it is not enough for a man who seeks preferential proof in bankruptcy to say that he received a salary; he must go further, and show that he was a clerk or servant within the meaning of the section. It is important to remember this in considering the decisions on that section. The other statutory provision dealing with salaries is what is now s. 209 of the Companies (Consolidation) Act, 1908. There, the words are the same as those in s. 33 of the Bankruptcy Act, 1914, and the same observation therefore applies to the decisions on s. 209. While I agree as to the difficulty of defining the word "salary" we must arrive at a general notion of its meaning, although even then it may be difficult to mark the point where "salary" merges into "wages," or when the particular form of payment ceases to be "salary" in the general sense of the word. In Stroud's Judicial Dictionary under the word "salary" there is this quotation

(1) 18 Q. B. 425.

from Termes de la Ley: "'Salarie' is a word often used in our bookes, and it signifies a recompence or consideration given unto any man for his paines bestowed upon another man's businesse." That was the old and broad meaning. It has undoubtedly now acquired a narrower signification, which is well suggested in the ordinary dictionary definition. I take the following definition of "salary" from the Imperial Dictionary: "The recompense or consideration stipulated to be paid to a person periodically for services, usually a fixed sum to be paid by the year, half year, or quarter. When paid at shorter periods the recompense is usually called pay or wages; thus, a judge, governor, or teacher receives a salary; a labourer receives wages." That dictionary meaning is in accordance with the judicial view so far as expressed upon the matter. In *Gordon* v. *Jennings* (1), where the question was as to the meaning of the word "wages" in the Wages Attachment Abolition Act, 1870, Grove J. said: "In the first place the word 'wages' is some indication of the object of the Act—for though it might be said to include payment for any services, in general the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of labourers and artisans." That I think gives the broad notion of the generally prevailing meaning. The same view has been taken in New Zealand, for I find in Bedwell's Australasian Judicial Dictionary, under the word "salary," a useful extract from the judgment of Williams A.C.J. in *In re Industrial Conciliation and Arbitration Act*, 1908 (2): "The term 'salary' is ordinarily used to signify the periodical remuneration paid to professional men, clerks, or persons whose duty it is to superintend, and who have in every case an appointment of some permanency. It is never ordinarily used as signifying the remuneration of manual labour or of any labour when the element of permanency is absent."

Was the present plaintiff in receipt of a "salary"? A director is not, I agree, a servant of the company in the ordinary sense, but he may be a servant under the terms of

(1) (1882) 51 L. J. (Q. B.) 417, 418. (2) (1909) 28 N. Z. L. R. 933, 940.

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his agreement as director, so that he may be indicted for embezzlement as a "clerk or servant," as was decided in *Reg.* v. *Stuart.* (1) A director is in fact a director or controller of the company's affairs. He is not a servant. This was laid down in *Dunston* v. *Imperial Gas Light and Coke Co.* (2); and it was emphasised in *Hutton* v. *West Cork Ry. Co.* (3), and again, in *Hopkinson* v. *Newspaper Proprietary Syndicate* (4), that not only is a director not a servant of the company, but that he is not, prima facie, entitled to any remuneration for his service. This was pointed out by Bowen L.J. in *Hutton* v. *West Cork Ry. Co.* (3); in Buckley on Companies, 9th ed., p. 619; and most emphatically by Joyce J. in *Stroud* v. *Royal Aquarium, &c., Co.* (5) Therefore for a director to get remuneration he must show some contract, or an agreement to be inferred from the articles of association, as in *In re Anglo-Austrian Printing and Publishing Union; Isaacs' Case.* (6) I dwell upon this point, because it is important in view of the decisions discussed by Lush J. to remember that the remuneration of a director may be nothing or it may be a honorarium dependent upon the vote of the shareholders in general meeting, as was in fact the case in *Hutton* v. *West Cork Ry. Co.* (3), where Bowen L.J.'s judgment has to be read in the light of this statement at p. 657 of the facts: "There was no clause in the company's articles of association authorising any salary to the directors." A director may also be paid so much per attendance at board meetings. I do not think that in either of those cases it can be said that the director is paid a salary: at all events the point is doubtful. But I can see no reason why a director should not be remunerated by a salary either by express agreement or by the effect of the articles. In every case the method and terms of remuneration must be clearly ascertained before any question of the Apportionment Act, 1870, can arise. "Directors' remuneration" is a vague phrase which may or may not mean a salary. The question is not in any given

(1) [1894] 1 Q. B. 310.
(2) 3 B. & Ad. 125.
(3) 23 Ch. D. 654.
(4) [1900] 2 Ch. 349.
(5) (1903) 89 L. T. 243.
(6) [1892] 2 Ch. 158.

case whether the director is a servant for the purpose of the Apportionment Act, the question is whether he is in receipt of a "salary." If it were necessary that a man should be a servant before the Apportionment Act applies, no Cabinet Minister, no high judicial officer, would be entitled to any apportionment. Further, the question is not whether the word "salary" is employed. It may or may not be employed. The word "reward," or "emolument," or "remuneration" may be used; in each case the substance rather than the actual word is to be looked at. Here the agreement says by clause 4 that the fees of the plaintiff for acting as director shall be 150*l.* per annum, that is, in my view, a fixed yearly remuneration for a substantial office to be held for a substantial period of time. In my opinion the plaintiff was in receipt of a "salary"; his reward could not be called "wages"; it was not contingent on profits; it did not depend upon a vote of the shareholders; and it was a permanent contractual right to a fixed yearly amount. Therefore the plaintiff comes within the Apportionment Act, 1870, unless there are decisions which compel us to take a contrary view.

In dealing with the decisions which have been cited to us I feel embarrassed, because they were given by judges widely experienced in this branch of law; but I desire to say two things—first, that in none of those cases was the Apportionment Act fully argued by counsel or fully considered by the tribunals, and I doubt if the tribunals appreciated the effect of the introduction of the word "salaries" into the Act of 1870; secondly, that the attitude in the minds of the tribunals was to regard the Apportionment Act as a wrongful encroachment upon common law proprieties. I take exactly the opposite view. The Act remedied a grave injustice; it is a remedial Act, and the inclination of every tribunal should be to extend rather than to restrict its operation. I shall only refer to the authorities briefly. With regard to *Salton* v. *New Beeston Cycle Co.* (1) I call attention to two features—first, that the judge did not really seek to apply

(1) [1899] 1 Ch. 775.

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to its full extent the Apportionment Act, 1870; and secondly, the decision turned upon the fact that the articles of association provided for what I may call a bulk remuneration depending upon a decision of the directors. Taking that view of the articles the judge might rightly say that there could be no right to a salary until there had been a decision of the directors. The principle is shown by *Caridad Copper Mining Co.* v. *Swallow.* (1) Unless the decision in *Salton* v. *New Beeston Cycle Co.* (2) turned upon the special point I have mentioned I should feel myself unable to follow it. Incidentally I observe that the judge seemed to pay no attention to the provision of the article that the fees should be divided equally; that point is not referred to in his judgment. *Inman* v. *Ackroyd & Best* (3) turns upon the same point. The plaintiff there claimed one sum under an article which provided for a bulk remuneration to be divided according to agreement between the directors, and it is clear that the decision of the Court of Appeal turned upon the fact that there was a bulk remuneration. With regard to the judgments of Wright J. in *In re Central De Kaap Gold Mines* (4) and *In re London and Northern Bank; McConnell's Claim* (5) I desire to add merely this, that in my view Wright J. seemed to regard the Apportionment Act as a thing to be rejected rather than to be applied, and his judgments have to be read in the light of that circumstance. With the greatest respect I am unable to follow the result arrived at by that most distinguished judge. The text-books conflict in their opinion of those decisions. In Buckley's Companies Acts, 9th ed., p. 621, it is assumed that Wright J.'s decisions are sound, whereas in Palmer's Company Precedents, 11th ed., Part I., p. 726, powerful reasons are given for the view that the Apportionment Act should have been applied. I agree with the arguments advanced in Sir Francis Palmer's work. I do not fail to see the wide stretch of the results which follow from the decision we are now giving, and one of

(1) [1902] 2 K. B. 44.
(2) [1899] 1 Ch. 775.
(3) [1901] 1 K. B. 613.
(4) 69 L. J. (Ch.) 18.
(5) [1901] 1 Ch. 728.

the questions that must arise in the future is whether or not the Apportionment Act will destroy the operation of the rule under which a servant who is dismissed for misconduct loses the whole of the money accruing to him, although he is entitled to get the money that has actually accrued. The rule has been clear since *Ridgway* v. *Hungerford Market Co.* (1) and *Lilley* v. *Elwin.* (2) The point was referred to by Lord Campbell in *Lowndes* v. *Stamford* (*Earl*). (3) This rule in the law of master and servant is a mere illustration of the rule with respect to indivisible contracts which was established by *Cutter* v. *Powell* (4), and illustrated by *Sinclair* v. *Bowles* (5) —namely, that till an indivisible contract is completed nothing can be obtained by way of payment. I express no opinion upon this very serious question, which does not arise for direct decision. It may well be said that no servant dismissed for misconduct can rely on that misconduct as a basis for invoking a remedial Act, just as no man can rely upon a self-induced frustration of a contract: see per Lord Sumner in *Bank Line* v. *Arthur Capel & Co.* (6) On the other hand I am not altogether satisfied as to the justice of denying the benefit of the Apportionment Act to a man who may have been guilty of misconduct. Suppose a salary is payable half yearly to a man, and suppose he has fulfilled his duties with absolute propriety up to the last week; that he then commits an act which justifies his master in dismissing him. Upon the law as it stands the man gets nothing for his five and a half months' work. Is it right that he should be deprived of remuneration for five and a half months' work because during the last fortnight he has done something for which he has been dismissed? I express no opinion upon that point. Ere long it must arise for decision.

If the Apportionment Act applies, the plaintiff is entitled to recover unless Mr. Hilbery establishes his point under s. 3 of the Act, that the plaintiff has brought his action too soon. That section clearly establishes a statutory defence under

(1) (1835) 3 A. & E. 171.
(2) (1848) 11 Q. B. 742.
(3) 18 Q. B. 425, 432.
(4) 6 T. R. 320.
(5) (1829) 9 B. & C. 92.
(6) [1919] A. C. 435, 452.

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Order x., r. 18, of the County Court Rules. The defendants should have given notice of it, and they did not do so, nor did they raise the point in the county court. They cannot rely upon it in this appeal.

On the further ground of claim by the plaintiff I desire to add this, that it is essential to remember that this agreement upon which the plaintiff sued sprang out of what took place on December 19, 1919. Upon that date a board meeting was held, when three things were done that are material—first, the company adopted this agreement with the plaintiff, secondly, the plaintiff was appointed a director there and then, and thirdly, the debentures were there and then issued. These events formed part of one transaction. I do not refer to the debentures further than to say that they contain certain terms which showed that the company might pay off at any broken period the moneys which they owed to the plaintiff. It is clear that both parties contemplated that the service might come to an end at any broken period and without any fault or misconduct of the plaintiff, and that was what happened in the present case, because in May, 1920, the plaintiff ceased to be a director without any fault or misconduct on his part. Therefore I agree that it is necessary to imply a term in this contract that remuneration should be payable for an apportioned period if a broken period occurred. Accepting the language of Lord Esher M.R. in *Hamlyn* v. *Wood* (1) where he said, "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist," I think we ought in this case to imply a stipulation that the salary should be payable for an apportioned period if circumstances arose which so required.

With regard to *Swabey* v. *Port Darwin Gold Mining Co.* (2), I confess I am unable to understand it, but I am inclined to the view that the Apportionment

(1) [1891] 2 Q. B. 488, 491. (2) 1 Megone, 385.

Act was never brought to the attention of the Court in that case.

I agree that the appeal must be allowed, and I desire to express my indebtedness to the arguments of counsel on both sides.

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Appeal allowed.

Solicitors for plaintiff: *Edmond O'Connor & Co.*
Solicitors for defendants: *Lidiard & Perowne.*

J. S. H.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A. 1920 *Nov.* 22.

THE KING *v.* MICHAEL O'KELLY SIMINGTON.

Criminal Law—Offence against Government—Wrongful Retention of Plan by former Public Official or Employee—Plan not relating to or used in a prohibited Place—Official Secrets Act, 1911 (1 & 2 *Geo.* 5, *c.* 28), *s.* 2, *sub-s.* 1 (*b*).

The Official Secrets Act, 1911, s. 2, sub-s. 1 (*b*), provides: "If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract, ... retains the sketch, plan, etc., in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it: that person shall be guilty of a misdemeanour":—

Held, that in that clause the words "which relates to or is used in a prohibited place or anything in such a place" belong to the first of the alternative provisions of the clause only, and are not to be read into any of its subsequent alternative provisions beginning with the words, "or which"; and, consequently, that, if a person having in his possession any sketch, plan, etc., which he has obtained as a person holding office under His Majesty, or employed under a person so holding office, retains the sketch, plan, etc., when he has no right to do so, he is guilty of an offence under the clause, notwithstanding that the sketch, plan, etc., does not relate to a prohibited place.

APPEAL against conviction and sentence.

The appellant Michael O'Kelly Simington was tried at the

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Central Criminal Court by McCardie J. and a jury, and was convicted of larceny on June 17, 1920, of four plans and five tracings of plans from the Office of Works; and of wrongfully retaining plans contrary to the Official Secrets Act, 1911, s. 2, sub-s. 1 (*b*), inasmuch as on September 26, 1920, having in his possession nine plans which he had obtained owing to his position as a person holding office under His Majesty, he retained them when he had no right to do so; and he was sentenced to fifteen months' imprisonment with hard labour.

The evidence on behalf of the prosecution went to show the following facts: The appellant was from April to August, 1916, employed as a clerk at the Office of Works. In the latter month he voluntarily enlisted in His Majesty's Army, in which he continued to serve until March, 1919, when he was demobilised. He thereupon again became a clerk in the Office of Works, where he continued to be employed until July, 1920, when he resigned. His duties as clerk were to keep formal records of the financial returns of the public works undertaken by the Office, and they had no relation to the making or keeping of plans and drawings.

From July 30 to September 21, 1920, the appellant and his wife occupied rooms in a house at Brixton. On the latter date they removed to a house at Stockwell, where they remained until September 26, 1920, when the appellant was arrested by the police.

The appellant after his demobilisation became connected with an organization known as the Irish Self-Determination League of Great Britain. He attended the meetings of the Clapham branch of that organization, being appointed in December, 1919, a member of the committee of that branch, and in July, 1920, the secretary thereof.

On September 26, 1920, there were found in the rooms which had been occupied by the appellant at Brixton a plan on tracing paper of the Irish Office at Westminster, and four plans and four tracings of these plans of buildings at Westminster which had been used by the Explosives Department of the Ministry of Munitions and by the Overseas Board.

All these plans and tracings belonged to and had been removed from the Office of Works.

On that date there were also found, in the rooms which had been occupied by the appellant at Brixton and/or Stockwell, letters, receipts and other documents relating to the said league or its Clapham branch, a minute book of the branch, and a flag of the "Irish Republic."

The above-mentioned plans, documents, and flag were made exhibits and shown to the judge and jury.

On behalf of the appellant, who was not himself put into the witness box, evidence was called with a view to showing that the plans in question had been made, not as working plans, but in order that copies of them might be taken for distribution among agents for letting purposes and that many copies were so taken and distributed.

The appellant appealed against the conviction on the ground (inter alia) that the learned judge was wrong in law in holding that s. 2 of the Act of 1911 was applicable to plans other than plans of "prohibited places" within the meaning of s. 3 thereof, and he applied for leave to appeal against sentence.

Charles K.C. (*J. D. Casswell* and *J. MacVeagh* with him) for the appellant. The appellant did not commit any offence under s. 2, sub-s. 1 (*b*), of the Official Secrets Act, 1911. (1) On the true construction of that clause the words "which relates to or is used in a prohibited place" are to be included not only in the first of its provisions, but also in each of the subsequent alternative provisions beginning with the word "or which." The appellant by merely having in his possession and retaining plans which he obtained as a person who held office under His Majesty or was employed under a person who so held office did not offend against the clause unless the plans related to a "prohibited place," as defined by s. 3 of the Act. None of the plans in question related to a prohibited place as so defined.

Eustace C. Fulton for the Crown.

(1) See headnote.

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The judgment of the Court (Earl of Reading C.J., Sankey and Salter JJ.) was delivered by

THE EARL OF READING C.J. The appellant was convicted of larceny as a public servant of certain plans and tracings of buildings at Westminster occupied by the Irish Office and other Government Offices ; and also under the Official Secrets Act, 1911, s. 2, sub-s. 1 (*b*), of retaining these plans after having obtained them owing to his position as a person holding office or employed under His Majesty. The appellant appeals against his conviction on the ground (inter alia) that the learned judge was wrong in holding that the clause of the Act of 1911 to which I have referred is applicable to plans other than those of "prohibited places" as defined in the Act. It has been argued on behalf of the appellant that the learned judge came to a wrong conclusion as to the interpretation of that clause. [His Lordship read clause (*b*) and continued :] It has been contended that on the true construction of that clause the words "which relates to or is used in a prohibited place or anything in such a place" are to be included not only in the first of its provisions, but also in each of its subsequent provisions beginning with the words "or which," so that each of the alternative provisions of the clause applies only to a sketch, plan, etc., which relates to or is used in a prohibited place ; and that as the plans in question do not relate, as is submitted, to any prohibited place within the meaning of the Act, the appellant committed no offence under the clause. That construction is no doubt ingenious, but it is impossible and indeed absurd. According to that construction it would be unnecessary to say more than is said in the first provision of the clause. If the clause meant that a person having in his possession or control and retaining any sketch, plan, etc., did not in any case commit an offence unless the sketch, plan, etc., related to or was used in a prohibited place, the result would be that all the provisions of the clause after the first would be superfluous. On the other hand, if the reference to a prohibited place be included in the first provision of the clause only, then none of its provisions is

superfluous or unmeaning. According to that construction the clause makes it an offence for a person to have in his possession and to retain any sketch, plan, etc., (i.) which relates to a prohibited place, (ii.) which has been made or obtained in contravention of the Act, (iii.) which has been entrusted in confidence to him by any person holding office under His Majesty, or (iv.) which he has obtained as a person who holds or has held office under His Majesty, or a contract on behalf of His Majesty, or as a person who is or has been employed under a person so holding office or a contract; and there can be no doubt or uncertainty as to the meaning of the clause and every part of it. That is the view of the clause which was taken by the learned judge at the trial, and this Court agrees with him.

The conviction and sentence must be affirmed.

Appeal dismissed.

Solicitor for appellant: *J. H. MacDonnell.*

Solicitor for Crown: *Director of Public Prosecutions.*

J. R.

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Nov. 29;
Dec. 8, 21.

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[1920. A. 1861.]

International Law — Jurisdiction — Status of Russian Soviet Republic — Recognition of Sovereignty — Confiscatory Decree — Validity.

The plaintiff company, which was a Russian company, had a factory or sawmill in Russia. The Russian Soviet Government on June 20, 1918, purported to make a decree declaring (inter alia) that all mechanical sawmills of limited or private companies with a capital of over 1,000,000 roubles and all woodworking establishments equipped with machinery belonging to private or limited companies were the property of the Russian Federative Republic. In 1919 the agents of the Russian Soviet Government took possession of and confiscated the plaintiff company's mill or factory and the manufactured stock of veneer or plywood. In August, 1920, the agents of the Russian Soviet Government purported to sell to the defendants a quantity of the plaintiff company's veneer or plywood confiscated. The defendants imported that wood into England, whereupon the plaintiff company brought an action claiming a declaration that they were entitled thereto.

The Secretary of State for Foreign Affairs in a letter to the defendants' solicitors on October 5, 1920, said that "His Majesty's Government assent to the claim of the [Russian Commercial] Delegation to represent in this country a State Government of Russia." In a letter to the plaintiffs' solicitors on November 27, 1920, he said that "for a certain limited purpose His Majesty's Government has regarded M. Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which M. Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and it may be very special questions of law upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty's Government have never officially recognised the Soviet Government in any way":—

Held, that if a foreign government or its sovereignty is not recognized by His Majesty's Government the Courts of this country will not recognize such foreign government or its sovereignty: that on the facts the Russian Soviet Government had not been recognized by His Majesty's Government as the government of a Russian Federative

(1) [*Sic* in the record; the transliteration is not quite correct or consistent.—F. P.]

Republic or of any sovereign state or power: that accordingly the Court was unable to recognize any such Russian Government or to hold that it had sovereignty or was able by its decree to deprive the plaintiff company of their property.

ACTION tried by Roche J.

The plaintiff company alleged by their statement of claim that they were incorporated in the Empire of Russia according to the laws of Russia in 1898 and that they thereafter carried on business in Russia. They owned a factory or mill at Staraja Russa in the Government of Novogorod in Russia where they manufactured veneer or plywood. They marked or stamped the boards of the veneer or plywood or the crates or packages of the boards with the trade mark or trade name "Venesta" or the mark "V. L." That trade mark or trade name was the property of a company called Venesta, Ld., which authorized the plaintiff company to use the same for marking or stamping boards or crates or packages of boards and to import into this country boards or crates or packages of boards marked or stamped with that trade mark or trade name.

The plaintiff company alleged that in 1919 they owned and had in their factory at Staraja Russa a large stock of boards of veneer or plywood all or most of which were stamped or marked with the trade mark or trade name "Venesta" or the mark "V. L." amounting in quantity to not less than 1500 cubic metres. In 1919, certain Russians calling themselves Commissaries and claiming to be, or to be the duly appointed agents of, a Republican Government of Russia wrongfully seized and purported to expropriate and wrongfully deprived the plaintiffs of their factory or mill at Staraja Russa, and wrongfully seized and purported to expropriate and wrongfully deprived the plaintiffs of their stock of boards at their factory or mill. Neither the Russians nor the so-called Republican Government ever paid or made over to the plaintiff company any money or other consideration in respect of the stock of boards. The plaintiffs alleged that no such Republican Government of Russia ever in fact or in law existed and no such Republican Government had ever been

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recognized by His Majesty's Government. Those Russians were therefore in law and in fact mere robbers and wrongdoers.

By a contract dated August 14, 1920, the defendants purported to agree to buy from the so-called Republican Government of Russia the plaintiff company's stock of boards or not less than 1500 cubic metres. The plaintiffs alleged that the defendants had under that contract obtained possession of and imported into England by the steamships *Kajak* and *Baltibor* a quantity of their stock of boards amounting to about 135 tons.

The plaintiffs claimed: (1.) a declaration that the 1500 cubic metres of veneer or plywood, which the defendants purported or agreed to buy as above mentioned, were the unincumbered property of the plaintiffs; (2.) a declaration that the shipments of veneer or plywood on the steamships *Kajak* and *Baltibor* were the unincumbered property of the plaintiffs; (3.) an injunction restraining the defendants their servants and agents from selling, pledging or in any manner whatsoever dealing with any part of the 1500 cubic metres of veneer or plywood which they purported to agree to buy under the contract of August 14, 1920, or alternatively with any of the boards or crates or packages of boards contained in the 1500 cubic metres of boards which bore the trade mark or trade name "Venesta" or the mark "V. L."; and (4.) damages for the wrongful conversion or detention of the 1500 cubic metres of veneer or plywood or alternatively of the shipments mentioned above.

The defendants by their defence said that the plaintiffs were domiciled and resident in the Republic of Esthonia and had their chief seat of business at Reval in that Republic, and that the plaintiffs had not at any material time any seat of business in Russia nor had they carried on business in Russia. The defendants said that the plaintiffs were therefore subjects of the Republic of Esthonia and subject to the laws and treaties made by that Republic, which Republic had been recognized by His Majesty's Government before January 27, 1919. During the whole of 1919 and up to February 2, 1920, the Republic of Esthonia was at war with

the Russian Soviet Republic. On February 2, 1920, a treaty of peace was concluded between the Republic of Esthonia and the Russian Soviet Republic. By Art. III. of that treaty the State boundary line between Russia and Esthonia was fixed and described, and Staraja Russa was recognized by the Republic of Esthonia as being within the territory and jurisdiction of the Russian Soviet Republic. Art. XIV. of the treaty provided for the establishment of mixed Russo-Esthonian Commissions to decide (inter alia) questions arising between either of the parties to the treaty and the citizens of the other party. Amongst the matters specifically referred to those commissions was the decision of the question of the delivering up of the property of citizens of Esthonia situate in Russia and also the property of Russian citizens situate in Esthonia, and other questions connected with the protection of the interests of citizens in the other country. The defendants said that if the plaintiffs ever had any claim to any property or goods which were at the date of the treaty at Staraja Russa the claim, if any, could by virtue of the facts set out above only be prosecuted through the agency of the mixed commissions.

The defendants said that if any factory or goods at Staraja Russa had been expropriated the act was the act of the Russian Soviet Republic being a sovereign state exercising supreme authority at Staraja Russa, and was valid and effectual to deprive the owners of the factory or goods of the property therein or alternatively to enable the Republic to pass a good title to foreign purchasers of the goods.

The defendants admitted that by a contract in writing of August 14, 1920, expressed to be made between the defendants and one L. B. Krassin, the representative of the Russian Commercial Delegation in London, the defendants purchased from the Russian Soviet Republic certain quantities of plywood (including the plywood claimed in this action) and that 1500 cubic metres of the plywood was therein described as being at "Station Starie Russey." The defendants denied however that the plywood or any of it ever was the property of the plaintiffs or that the plaintiffs had ever been entitled

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to the possession thereof. Alternatively the defendants said that the plywood was manufactured by the servants and/or agents of the Republic wholly from timber the property of the Republic and that that timber never was the property of the plaintiffs.

The defendants said that the Russian Commercial Delegation was present in London with the knowledge, consent, and permission of His Majesty's Government for the purpose of entering into commercial contracts with traders in this country, who were authorized and permitted by His Majesty's Government to enter into commercial contracts with the delegation.

By a letter of July 28, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the solicitors for L. B. Krassin it was stated that Krassin was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of carrying out certain negotiations. It was further stated therein that His Majesty's Secretary of State regarded Krassin as a foreign representative and as one who in view of the negotiations should be exempt from the processes of the Courts.

In a letter of October 5, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the defendants' solicitors it was stated that: "His Majesty's Government assent to the claim of the Delegation to represent in this country a State Government of Russia."

The defendants said that the Russian Soviet Republic had thereby been recognized by His Majesty's Government as the government of a sovereign state exercising authority in territory which included Staraja Russa.

The defendants further said that no demand for delivery up of the goods claimed was made before action brought by the plaintiffs or by any person on their behalf.

On November 27, 1920, a letter was written on behalf of His Majesty's Secretary of State for Foreign Affairs to the plaintiffs' solicitors in answer to a request for information which stated: "I am to inform you that for a certain limited

purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty's Government have never officially recognised the Soviet Government in any way."

The facts including the decree of the Russian Soviet Republic under which the wood was confiscated and the contract under which it was sold to the defendants are set out in detail in the judgment.

Barrington-Ward K.C. and *St. John Field* for the plaintiffs.

Hogg K.C. and *H. L. Murphy* for the defendants. The plaintiff company had their head office at Reval and were therefore domiciled and resident in Esthonia and were accordingly bound by the treaty of peace between the Republic of Esthonia and the Russian Soviet Republic on February 2, 1920. Under that treaty the plaintiffs were bound to prosecute any claim they might have before the mixed Russo-Esthonian Commissions as provided in Art. XIV. of the treaty and they are not entitled to set up any claim to their property before the Courts of this country. Even if the plaintiff company are not bound by that treaty of peace still they are bound by the acts of the Russian Soviet Republic in taking possession of their property and selling it to the defendants. The Russian Soviet Republic made a decree dated June 20, 1918, under which all woodworking establishments equipped with machinery which belonged to private or limited companies were declared the property of the Russian Socialist Federative Republic. The plaintiff company's factory and stock of veneer and plywood were taken possession of under that decree. All that the Courts of

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this country can consider is whether that decree was made by a state which has been recognized by the Government of this country, and if it was they are bound to recognize acts done under it as binding; they cannot consider whether the decree is a proper decree. The letter from the Foreign Office of October 5, 1920, amounts to a recognition by the British Government of the Russian Soviet Republic as a de facto Government in Russia although it may not be a recognition of the republic as a de jure government. It is sufficient to enable the defendants to contract with the Russian Soviet Republic that that government has been recognized as a de facto government, and it is not necessary that it should also have been recognized as a de jure government: *Republic of Peru* v. *Dreyfus Brothers* (1); *United States of America* v. *Prioleau*. (2) The certificate of the Foreign Office is conclusive on the point as to the status of the Russian Soviet Republic: *Mighell* v. *Sultan of Johore*. (3) In that case the Colonial Office had written a letter stating that the Sultan of Johore "generally speaking, exercises without question the usual attributes of a sovereign ruler" and the Courts held that the letter was conclusive as to his being an independent foreign sovereign, and therefore not subject to the jurisdiction of the Courts of this country. It is true that Sir Robert Phillimore in the case of *The Charkieh* (4) did not regard the letter of the Foreign Office as to the status of the Khedive of Egypt as conclusive but sought to inform himself from historical and other sources as to his status. Lord Esher M.R. however expressed the opinion in *Mighell* v. *Sultan of Johore* (5) that he ought not to have done so, but ought to have accepted the authoritative certificate of the Queen through her minister of state as to the status of another sovereign as decisive. It is unnecessary to discuss how far the rule of the Soviet Republic extends in Russia because it is admitted that its rule extends over the place where the plaintiffs' factory is situated. In order to entitle the defendants to succeed it is

(1) (1888) 38 Ch. D. 348.
(2) (1865) 2 H. & M. 559.
(3) [1894] 1 Q. B. 149.
(4) (1873) L. R. 4 A. & E. 59.
(5) [1894] 1 Q. B. 158.

sufficient to show that the Soviet Republic has been recognized by the British Government, and that it has deprived the plaintiffs of their goods under a decree, and that the defendants are in possession of those goods under a contract with the agents of the Soviet Government. In *Williams* v. *Bruffy* (1) the Supreme Court of the United States decided that the Confederate Government was a rebel government and not a de facto government as ultimately it was not successful. Field J. in delivering the judgment of the Court discussed the question as to what constitutes a de facto government. He said that one kind of de facto government "is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. . . . . As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognised; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled." That language applies almost exactly to the position of the Soviet Government. The Court assumed that the acts of a de facto government, even though they are confiscatory, cannot be called in question before the Courts of another country. The Supreme Court of the United States in *Oetjen* v. *Central Leather Co.* (2) and *Ricaud* v. *American Metal Co.* (3) held that the courts of one country will not sit in judgment on the acts of the government of another country done within its own territory and that redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. The Court also held that the principle that the conduct of one independent government cannot be successfully questioned in the courts of another country is applicable to a case involving the title to property brought within the

(1) (1877) 96 U. S. R. 176, 185. (2) (1918) 246 U. S. R. 297.
(3) (1918) 246 U. S. R. 304.

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custody of that Court. As the Russian Soviet Government has been recognized by the Foreign Office as a State Government of Russia it follows that the legality of what that Government has done within the territory over which it rules in Russia cannot be inquired into by this Court. This is an action in detinue. In order to support an action of detinue there must be proof that the detention of the article claimed is wrongful, the mere fact of the possession of the article is not sufficient to support the action. It is therefore necessary in order to support the action that there should have been a demand and a refusal to deliver up possession of the article before action: *Clayton* v. *Le Roy*. (1) In the present case there was no demand before action and therefore the action will not lie.

Barrington-Ward K.C. in reply. This action is not brought in detinue but for a declaration that the veneer or plywood is the property of the plaintiffs, therefore the rule that in an action of detinue it is necessary to prove a demand and refusal before action does not apply. It was said in *Clayton* v. *Le Roy* (1) that there must be an assertion by the defendant of a hostile right. That was done in the present case by the defendants' letter of October 22, 1920, to Venesta, Ld. The plaintiffs are not bound by the treaty of peace between Esthonia and the Russian Soviet Republic as they are not subjects of Esthonia. By the treaty persons of non-Esthonian origin including juridical persons are entitled to one year within which to decide whether they will become citizens of Esthonia. That year had not expired and the plaintiffs had not elected to become Esthonians. The treaty by Art. XIV. only refers to the decision of the mixed commission questions as to property of Esthonian citizens situated in Russia. The property in this case is not situated in Russia but in England, and therefore the treaty does not apply. The main question in this case is whether or not the Russian Soviet Republic has been recognized by the British Government as an independent sovereign state in that part of Russia where the plaintiffs' factory is situated. If the Government has not

(1) [1911] 2 K. B. 1031.

been recognized by the British Government it cannot be recognized by the Courts of this country, which in those circumstances are bound to consider the ancient state of things as remaining unaltered: see Halleck's International Law, 4th ed., vol. i., p. 90. *Republic of Peru* v. *Dreyfus Brothers* (1) and *United States of America* v. *Prioleau* (2) merely establish the proposition that after a foreign government has been recognized as a de facto government by the British Government the subsequent acts of that de facto government cannot be called in question before the Courts of this country. But until there has been recognition by the British Government of such new state any transaction with such new state is unenforceable before the British Courts: *Jones* v. *Garcia del Rio.* (3) In *Thompson* v. *Barclay* (4) it was held that a transaction that formed part of a plan for raising a loan for a foreign state, which was a revolted colony of a friendly power, and which had not been recognized by the Government of this country, was illegal, and therefore an action could not be brought in respect of that transaction. The Vice-Chancellor there pointed out that the Courts of this country cannot recognize persons representing themselves to be governments of foreign countries till the Government of this country have recognized them. That statement of law was not dissented from by Lord Brougham L.C. (5) in affirming the decision although he expressed doubts on other points. It had previously been decided in *The City of Berne* v. *Bank of England* (6) that a judicial Court cannot take notice of a foreign government not acknowledged by the government of the country in which that Court sits. In *The Gagara* (7) the Attorney-General stated in open Court that the British Government had, for the time being, recognized the Esthonian National Council as a de facto independent body, and that was held to be a recognition which accorded them the status of a foreign sovereign. In *The Annette* (8) the Foreign Office

(1) 38 Ch. D. 348.
(2) 2 H. & M. 559.
(3) (1823) T. & R. 297.
(4) (1828) 6 L. J. (O. S.) Ch. 93.
(5) (1831) 9 L. J. (O. S.) Ch. 215.
(6) (1804) 9 Ves. 347.
(7) [1919] P. 95.
(8) [1919] P. 105.

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wrote informing the Court that the Provisional Government of Northern Russia had not been formally recognized by the British Government although the Allied Powers were co-operating with them in opposition to the Russian Soviet Government, and it was held that did not amount to an informal recognition of the Provisional Government as a sovereign independent state. Following the authority of those cases this Court ought to come to the conclusion that there has been no recognition by the British Government of the Russian Soviet Government as a sovereign independent state. Even if the British Government has recognized the Russian Soviet Government, still the Courts of this country will not give effect to the penal laws of the Russian Soviet Government depriving the plaintiffs of their rights. "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend": *Folliott* v. *Ogden*. (1) "No country regards the penal laws of another": *Wolff* v. *Oxholm*. (2) Marshall C.J. said in *United States* v. *Percheman* (3): "It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled." The letter of the Foreign Office does not amount to more than this, it informs the defendants that they may trade with Krassin without incurring penalties; it does not amount to a recognition of the Soviet Government.

H. L. Murphy in reply on the cases. The point in *Folliott* v.

(1) (1789) 1 H. Bl. 123, 135; affirmed (1790) 3 T. R. 726.

(2) (1817) 6 M. & S. 92, 99.

(3) (1833) 7 Peters, 51, 86.

Ogden (1) and *Wolff* v. *Oxholm* (2) is covered by the decision in *Republic of Peru* v. *Dreyfus Brothers.* (3) *City of Berne* v. *Bank of England* (4) is a peculiar case depending upon the particular facts in that case. The case of *Dolder* v. *Lord Huntingfield* (5) was brought subsequently in respect of the same funds. At the time the Helvetic Republic had not been recognized by the British Government. In *Yrisarri* v. *Clement* (6) the Court of King's Bench heard evidence as to whether the Republic of Chili was a sovereign independent state before its independence had been recognized by Great Britain. The Court is bound by the unambiguous statement of the Foreign Office that the Soviet Government is a State Government of Russia. If the information supplied by the Foreign Office does not lead to a clear conclusion the Court is not confined to that source of information but may inform itself from other sources as was done in the case of *The Charkieh.* (7) The Court of Appeal in *Mighell* v. *Sultan of Johore* (8) held that Sir R. Phillimore was wrong in so doing, but that was because the information supplied by the Foreign Office in that case was clear and unambiguous. The fact that the Soviet Government is the only Government in existence in that part of Russia where the plaintiffs' factory is and that it has entered into a treaty of peace with Esthonia must not be overlooked in considering whether it is a de facto government. The information supplied by the Foreign Office in the case of *The Annette* (9) with regard to the recognition of the Government of Northern Russia falls very short of that supplied in the present case with regard to the recognition of the Russian Soviet Government. The Foreign Office have intimated that the head of the Russian Commercial Delegation is entitled to diplomatic immunity and therefore it must be implied that the Government which he represents has been recognized as a de facto government.

Cur. adv. vult.

(1) 1 H. Bl. 123.
(2) 6 M. & S. 92.
(3) 38 Ch. D. 348.
(4) 9 Vesey, 347.
(5) (1805) 11 Vesey, 283.
(6) (1825) 2 C. & P. 223; (1826) 3 Bing. 432.
(7) L. R. 4 A. & E. 59.
(8) [1894] 1 Q. B. 158.
(9) [1919] P. 105.

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1920. Dec. 21. ROCHE J. read the following judgment. This action raises for determination a dispute as to the property in certain parcels of wood goods which arrived in this country in the autumn of this year in the steamships *Kajak* and *Baltibor*. The parties agreed that I should decide questions of principle and liability only, and that all questions of detail and amount as well as certain matters arising under an interlocutory order of the Court should be referred to Mr. Leck K.C.

The facts, so far as it is necessary for me to determine them, I find to be as follows: Before the war Venesta, Ld., a British company, imported into this country large quantities of veneer, or plywood, under the trade mark, or trade name, of "Venesta," and the brand of "V. L." This trade mark, or name, was the property of Venesta, Ld. The goods so imported were manufactured at the factory, or mill, of the plaintiff company for Venesta, Ld. This factory, or mill, was at Staraja Russa in Russia. Venesta, Ld., was by far the largest shareholder in the plaintiff company, and had advanced, in addition, large sums to the plaintiff company in respect of goods in process of manufacture, or to be manufactured for Venesta, Ld. The sums outstanding in respect of such advances to provide the plaintiff company with capital were stated to amount to some 200,000*l*. No veneer or plywood, or none of the description now in question, was manufactured at Staraja Russa after the early part of 1918. This cessation of manufacture was brought about by the prevalence of conditions unfavourable to commerce. A considerable portion of the goods in the *Kajak* and *Baltibor* now in question bore the marks of "Venesta," or "V. L.," either on the wood, or on the crates in which the goods were packed, and I find that all wood so marked or identifiable was manufactured by the plaintiff company in or before 1918. It is said by the plaintiff company that it can be established that the whole of the parcels were so manufactured. This is a matter which falls to the referee to determine. My decision refers to wood marked, or identifiable, as, or found to be, manufactured at Staraja Russa prior to, or in the year, 1918.

In January, 1919, the factory or mill passed out of the control of the plaintiff company (whether rightly or wrongly for this immediate purpose I need not consider), and in so far as goods were thereafter manufactured at that factory or mill, or were of other manufacture, they would not fall within this decision and the plaintiff company would fail to satisfy me that the property in such goods was in the plaintiff company. When I say "Whether rightly or wrongly for this immediate purpose I need not consider," I do not mean by that for my main purpose, but only for the purpose of ascertaining the particular quantity of goods which fall within the judgment.

Such being the history of the veneer in question, and of the connection of Venesta, Ld., therewith, on October 22, 1920, the defendants, a firm carrying on business in London, wrote to Venesta, Ld., as follows :—

"The Managing Director,
"Venesta, Limited,
"1, Great Tower Street, E.C.3.

"DEAR SIR,

"We have recently purchased a parcel of Birch plywood and duly received information from our agent that the goods have arrived at port, and about 75 tons of plywood out of our parcel is marked 'Venesta.'

"We consider that it is our duty to bring this fact to your notice as you may be interested in purchasing the parcel from us. Should you not be interested in doing so, we would like to know if you would prefer us to remove the mark before offering these goods on the market.

"Awaiting your reply, we remain,
"Yours faithfully,
"JAMES SAGOR & Co."

Thereupon the writ in this action was issued, and by that action the plaintiff company seeks to establish that the goods which the defendants were purporting to sell were the property of the plaintiff company, and not of the defendants.

Between the plaintiff company's right to the goods in 1918

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and its claim to them in 1920 the defendants interpose matters which they assert have transferred the property to themselves. These matters are: (1.) A confiscatory decree affecting establishments such as that at Staraja Russa purporting to emanate from the Government of Russia, and to bear date June 20, 1918. No official copy of this decree is available, but there was produced before me the following document :—

"Translation made by Official of Commission for collecting information in Russia.

"'Board of Trade,

"'22 Carlisle Place, S.W.1.

"'From UNE LEGISLATION COMMUNISTE,

"'Published by Hayot, Paris, 1920.

"'Decree of Council of Commissars for the People of 20th June, 1918, which appeared in "Izviestia" in Moscow on 30th June, 1918. No. 134.

"'By Article 1: All industrial and commercial establishments mentioned below with their capital and assets of whatever nature are declared the property of the Russian Socialist Federative Republic (*inter alia*)

"'(17) All the mechanical saw mills of limited or private Companies which have a capital of at least 1,000,000 Roubles.

"'(18) All woodworking establishments equipped with machinery which belonged to private or limited Companies.

"'Decree signed by Lenin in presence of Council of Commissars and by Commissars of the People.

"'TSIRIOUP NAGUINE RIKOF,

"'Business Director.

"'BOVITCH-BROVENITSCH,

"'Secretary of the Council.'"

I pause only to observe that the decree claims to be made for, and presumably by, a federative republic, and that a Mr. Muller, who was called before me, and who was a member, or official, of a Soviet Delegation in this country, made it plain that in his view Russia as a whole, including, for example, the Ukraine, was included within the ambit of the

territory and of the legislation or decrees of the Government or body which the delegation represented. (2.) The second matter relied upon was the fact, which was alleged by the plaintiffs and was established by the evidence on both sides, that Commissaries or officials of some central Soviet body or organization, in spite of some resistance from the local workers or Soviets, did succeed in 1919 in taking possession of the factory or mill at Staraja Russa and of the manufactured goods lying there. I am not clear, however, whether the Commissaries, or the Council directing them, really claim as of right to deal with and dispose of such manufactured goods even if the product of foreign capital; but whether by mistake or otherwise, they have in this instance dealt with and sought to dispose of them. (3.) The third matter relied upon was a contract dated in London, August 14, 1920. That is the contract made in London on that date between L. B. Krassin, the representative of the Russian Commercial Delegation in London, and James Sagor & Co. of Coventry House, South Place, Finsbury, London. It sets out that Krassin, on behalf of the Russian Commercial Delegation, sold to Sagor & Co. about 8000 cubic metres of birch, alder, and aspen plywood of different thicknesses and sizes. The contract states, under the heading of "Quality": "The goods must be sorted to qualities as has been done previous to the war; the goods being accepted by the buyer as to the quality by his agents at the mills. In case if one or another parcel did not correspond to the standard of sorting as has been done previous to the war the buyer has the right to refuse this parcel, and the quantity sold will be reduced by the quantity which is rejected if the buyer will reject of that parcel more than 20 per cent. Sizes: The sizes of the Boards must be about 60″ x 60″ 60″ x 40″ 48″ x 40″ in thicknesses 3 mm., 4 mm., 5 mm., and 6 mm. Boards for tea chests must be cut to the following sizes:—4 Boards 23 7/8″ by 18 5/8″. 2 Boards 18 5/8″ by 18 5/8″. Packing: The goods must be packed in bundles well tied up either with rope or with iron hoops and each package must bear the marks of the size of the boards, the quantity of boards, and the quality. After

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inspecting the goods at the mills with the representative of the buyer the goods must be sent to ports for loading on the steamers. The goods may be loaded at Petrograd if the British Government have no objection to same, otherwise the goods will be sent to Reval. At any rate, the steamers must be sent during the navigation of 1920, and in each case the seller must be notified three weeks in advance when the steamer comes into port. Loading on each steamer must be done within ten days from the date when the steamer arrives at the port, otherwise demurrage is to be paid by the seller. Payment: James Sagor & Co. undertake themselves to pay for all goods in cash on the following conditions: If the goods will be sent via Reval then as soon as the goods are transferred at Reval to the forwarding agents of the buyer he is to pay 30 per cent. of the value of the goods, and the balance against bills of lading. In case the goods will be shipped from Petrograd then the payment is made against bills of lading. The place of payment is at the option of the seller. If within six weeks of the arrival of the goods at Reval there will be no steamer to load same then the buyer accepts the goods at the place, and pays the full value of same less expenses of loading. In any case all expenses for taking care of the goods at Reval after the expiration of six weeks is to be borne by the buyer. If for some reason which may occur on account of the present negotiations between the British Government and the representatives of the Russian Commercial Delegation the above mentioned goods cannot be transferred to the buyer during this Summer at Petrograd and the seller will not be able to send the whole parcel to Reval then not less than 50 per cent. sold goods must be sent to Reval during this year's navigation. The balance of the quantity of the Contract must be delivered during the navigation of 1921. The buyer has the option to buy another 8,000 cubic metres to be delivered during 1921. Signed on behalf of the Russian Commercial Delegation. Commissary to the Foreign Trade, Krassin; Secretary, Klishko." That is under the seal of the agents of the Soviets of the People's Commissaries. I do not know that that is

a very good translation, but that is the translation which was given to me. It appears from the correspondence, p. 1 (being a letter of May 27, 1920, from the Board of Trade, Department of Overseas Trade), and from the evidence that the negotiations which led up to this contract were instituted by a delegation of Russian co-operative societies known as "A.R.C.O.S." Mr. Muller's evidence on this point was to the following effect: "I know Russian Co-operative Societies. They are called 'A.R.C.O.S.' They sent a delegation to this country. Krassin was the head of that, and is the head still of the present delegation. I was secretary of that delegation, and am still. All the officials of the two delegations are the same. Since we came to this country the Central Co-operative Societies have been abolished by the decree of the People's Commissaries. I do not know whether they asked the Co-operative Societies before they abolished them. We became the representatives of the Soviet Government."

It does not appear how, or by what title, the co-operative societies came to be dealing with the goods, nor, if they had a title, by what decree their title passed to the body which made the contract now relied upon. Apart from any criticisms or doubts which may arise upon matters arising under the above heads (2.) and (3.), it is clear that the defendants' claim to defeat the plaintiffs' title depends in the first instance upon the decree mentioned under head (1.) being a valid legislative act which can be recognized as such in the Courts of this country. In the view I take of this point it is not necessary further to consider heads (2.) and (3.). I therefore confine my judgment to head (1.).

Whether the decree in question is a valid legislative act which can be recognized as such by the Courts of this country must, in my judgment, depend upon whether the power from which it purports to emanate is what it apparently claims to be, a sovereign power, in this case the sovereign power of the Russian Federative Republic. The proper source of information as to a foreign power, its status and sovereignty, is the Sovereign of this country through the

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Government: *Mighell* v. *Sultan of Johore* (1); *Foster* v. *Globe Venture Syndicate.* (2) In the case of *The Charkieh* (3) Sir Robert Phillimore had recourse to other sources of information in order to determine a question arising in the year 1873 as to the status and sovereignty of the Khedive of Egypt, but in the opinion of Lord Esher, expressed in his judgment in *Mighell* v. *Sultan of Johore* (4), this course was wrong. At all events, even if I were entitled to look elsewhere for information I am certainly not bound to do so, and in this case I know of no other sources of information available to which I can safely or properly resort.

I therefore propose to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs. The attitude proper to be adopted by a Court of this country with regard to foreign governments or powers I understand to be as follows: (1.) If a foreign government is recognized by the Government of this country the Courts of this country may and must recognize the sovereignty of that foreign government and the validity of its acts: see *Republic of Peru* v. *Dreyfus* (5), and the cases there cited. (2.) If a foreign government, or its sovereignty, is not recognized by the Government of this country the Courts of this country either cannot, or at least need not, or ought not, to take notice of, or recognize such foreign government or its sovereignty. This negative proposition is, I think, also established and recognized by the judgment of Kay J. in *Republic of Peru* v. *Dreyfus.* (6) I think it, however, to be desirable that I should notice some of the earlier decisions. In the *City of Berne* v. *Bank of England* (7) the question at issue was the right of an unrecognized foreign government to maintain a suit, but Lord Eldon's judgment is, I think, an authority for the general proposition I have stated. It was suggested that in *Dolder* v. *Lord Huntingfield* (8) Lord Eldon departed from or expressed a doubt with

(1) [1894] 1 Q. B. 149.
(2) [1900] 1 Ch. 811.
(3) L. R. 4 A. & E. 59.
(4) [1894] 1 Q. B. 158.
(5) 38 Ch. D. 348.
(6) 38 Ch. D., pp. 357, 358, and 359.
(7) 9 Ves. 347.
(8) 11 Ves. 283.

regard to the view he had expressed in the *City of Berne Case*. (1) I do not agree with this suggestion. *Dolder* v. *Lord Huntingfield* (2) turned on points of procedure and pleadings, and left the question of the method of proof as to the status of a foreign state which might arise at a later stage in the suit exactly where it stood before. Indeed, it is quite plain from his judgment in *Jones* v. *Garcia del Rio* (3) that Lord Eldon was in the year 1823 of the same opinion as he was when he decided the *City of Berne Case* (1) in 1804. In *Thompson* v. *Barclay* (4) Shadwell V.-C. stated the law with regard to governments of foreign countries to be that "the Courts cannot acknowledge them till the Government of the Country has recognised them." This case came before Lord Brougham as Lord Chancellor in 1831 (*Thompson* v. *Barclay* (5)), and although on some other points he was not in agreement with the Vice-Chancellor, yet on the question of recognition Lord Brougham (6) expressed the same view as the Vice-Chancellor had expressed.

To come to quite recent times, Hill J., in *The Annette* and *The Dora* (7), stated the law thus: "I must be satisfied before I can recognise the Provisional Government of Northern Russia as a Sovereign State, for the purposes of this case, that the British Government so recognise it." The cases of *United States of America* v. *Prioleau* (8) and *United States of America* v. *McRae* (9), cited by the defendants' counsel, were decided upon principles other than any principle now under discussion, and seem to me not to bear upon the effect of recognition or its absence where matters of sovereignty and status are in question: see *West Rand Central Mining Co.* v. *The King* (10) at pp. 411 and 412 for the real point of these decisions.

On the general proposition the Courts of the United States appear to take the same view as our Courts. The Supreme

(1) 9 Ves. 347.
(2) 11 Ves. 283.
(3) T. & R. 297.
(4) 6 L. J. (O. S.) Ch. 93, 97.
(5) 9 L. J. (O. S.) Ch. 215.
(6) Ib. 221.
(7) [1919] P. 105, 111.
(8) 2 H. & M. 559.
(9) (1869) L. R. 8 Eq. 69.
(10) [1905] 2 K. B. 391.

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Court in *Gelston* v. *Hoyt* (1) laid down the law as follows: "No doctrine is better established, than that it belongs exclusively to Governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own Government, or the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this Court in the case of *Rose* v. *Himely* (2), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals: *The Manilla* (3); *City of Berne* v. *Bank of England.* (4)"

This being the law which must guide and direct my decision, I have to consider whether and in what sense the Government represented by M. Krassin in this matter is recognized by His Majesty's Government. The materials for a decision have been provided for me by the parties who have each by their solicitors asked for information from His Majesty's Secretary of State for Foreign Affairs. The information conveyed in reply is summarized in the following letters. At p. 5 of the correspondence there is a letter to the defendants' solicitors which reads as follows:—

"FOREIGN OFFICE,
5th October, 1920.

"Sir,

"I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter of the 22nd September, and to inform you that His Majesty's Government assent to the claim of the Delegation to represent in this country a State Government of Russia."

That was made more plain and was amplified in a letter of November 27, 1920, to the plaintiffs' solicitors in answer to certain requests for information which were made by them. That letter reads as follows:—

(1) (1818) 3 Wheat. 246, 324.
(2) (1808) 4 Cranch, 241.
(3) (1808) Edw. 1.
(4) 9 Ves. 347.

"FOREIGN OFFICE,

"27th November, 1920.

"Gentlemen,

"I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter FT/A of November 19th, requesting certain information concerning the Russian Trade Delegation in this Country, and the Esthonian-Russian Peace Treaty. I am to inform you that for a certain limited purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this Country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult, and it may be very special questions of law upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty's Government have never officially recognised the Soviet Government in any way."

It was said on behalf of the defendants that these communications were vague and ambiguous. I should rather say that they were guarded, but as clear as the indeterminate position of affairs in connection with the subject-matter of the communications enabled them to be; but lest it should be deemed that ampler or further information might now be available, I caused communication to be made by a Master of the Crown Office to His Majesty's Secretary of State for Foreign Affairs, asking whether there was in addition to the letters to the parties or their solicitors further matter or information which should be placed before me. The reply of the Secretary of State was that he had no further information which he desired to place before me. On these materials I am not satisfied that His Majesty's Government has recognized the Soviet Government as the Government of a Russian Federative Republic or of any sovereign state or power. I therefore am unable to recognize it, or to hold it has sovereignty, or is able by decree to deprive the

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plaintiff company of its property. Accordingly I decide this point against the defendants.

The point was taken by the plaintiff company that inasmuch as the decree relied upon by the defendants was confiscatory and not conformable to the usage of nations, it could not be relied upon in this Court. *Wolff* v. *Oxholm* (1) was cited in support of this argument, but having regard to my view that I cannot recognize the decree as that of a sovereign power, in my opinion it is unnecessary for me to consider or decide this point, and I do not do so. I merely record that it was taken, and is open to the plaintiff company elsewhere.

A further and entirely different answer to the plaintiffs' claim was raised by the defendants—namely, that the plaintiff company was an Esthonian company, and by reason of certain treaty stipulations was unable to assert a claim to this property in this Court. This matter is dealt with by paras. 3 to 11 of the defence. The facts are shortly as follows: Down to February 2, 1920, the plaintiff company's head office was at Reval, which is now in Esthonia. Its mill, or factory, was in Russia. On February 2 there was made a treaty of peace between Esthonia and the Soviet Government. The defendants say that the claims of Esthonian subjects are, by the treaty, relegated to the sole arbitrament of a mixed commission thereby set up. Apart from any difficulty which might arise from the absence of recognition of one of the parties to the treaty, there is, as it seems to me on the facts as I find them, a short answer to the defendants' contention. The plaintiff company was not an Esthonian company, but a Russian company before the treaty, and after the treaty it did what the treaty (Art. IV.) entitled it to do, elected to be, or remain, Russian.

The defendants took the further point that at all events this action, which they said was an action in detinue, would not lie, because there was no demand for the goods and no refusal of the demand before writ: *Clayton* v. *Le Roy*. (2) The defendants, desiring the main issues between the parties to be decided, asked that a decision on this point should be

(1) 6 M. & S. 92. (2) [1911] 2 K. B. 1031.

treated as going only to the question of costs. But although the proposition of law upon which the defendants base this contention is beyond dispute, the contention fails on the facts. The action is framed as claiming certain declarations and consequential relief, and one of the alternative modes of relief available and sought is the award of damages for conversion. I hold that the plaintiffs are entitled, in substance, to the declaration claimed, subject as to the quantity of goods covered by my judgment to further inquiry before the referee, and that the plaintiffs are entitled, with the like reservation, to the injunction prayed. I also hold that the claim of the defendants to sell the goods amounted to conversion. But practically, having regard to the interlocutory order made on November 1, 1920, which embodied in an order a business method of dealing with the matter evolved by the parties, or their advisers, an assessment of damages would seem to be unnecessary. It may, however, and I think it will be desirable in case the matter goes further, that the referee should assess the money value of the goods when he is dealing with the other matters arising for his decision. I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Linklaters & Paines.*
Solicitors for defendants : *H. W. & S. Patey.*

R. F. S.

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Oct. 25, 26.

THE KING *v.* JUSTICES OF SURREY.

Licensing Acts—On-licence—Renewal—Provisional Grant—Reference to Compensation Authority—Justices equally divided—No Refusal to renew—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 19—*Licensing Rules*, 1910, *r.* 41.

An application for the renewal of an existing on-licence was made at a general annual licensing meeting, and the justices, being of opinion that the question of the renewal of the licence required consideration on the ground (inter alia) that the licence was unnecessary, granted a provisional renewal of the licence in accordance with r. 41 of the Licensing Rules, 1910, and under s. 19 of the Licensing (Consolidation) Act, 1910, referred the matter to the compensation authority. At the meeting of the compensation authority the justices present were equally divided, three being in favour of and three against the renewal of the licence, and in consequence no judgment of the compensation authority was recorded.

A rule nisi for a mandamus to the compensation authority to hear and determine the application for the renewal of the licence having been obtained :—

Held, that the compensation authority had jurisdiction only to decide whether or not the renewal of the licence should be refused, and not to renew the licence, and that as the compensation authority had not decided to refuse the renewal the licence granted provisionally continued in operation until the next general annual licensing meeting, and that the rule nisi for a mandamus must, therefore, be discharged.

Rule Nisi to the justices in and for the county of Surrey acting as the compensation authority for the said county in pursuance of the provisions of the Licensing (Consolidation) Act, 1910, to show cause why a writ of mandamus should not issue directed to them commanding them to hear and determine pursuant to the statutes in that behalf the matter of an application by one Julia Isabel Mitchell for the renewal to her of a licence for the sale by retail of intoxicating liquor at the premises occupied by her situate at High Street, Reigate, and known as the Bull's Head, or, alternatively, to give notice of the refusal of the said licence in accordance with the provisions of r. 18 of the Licensing Rules, 1910, and to proceed to the assessment of compensation on the ground that, the justices being equally divided, the application for renewal was refused.

At the general annual licensing meeting for the borough of

Reigate held on February 3, 1920, objection was made by the justices for the borough to the renewal of the licence of the Bull's Head alehouse in the High Street, and the hearing of the application for the renewal of the licence was adjourned until the adjourned general annual licensing meeting to be held on March 2, 1920.

On February 19, 1920, by direction of the justices a notice was served on Julia Isabel Mitchell the licensee of the Bull's Head requiring her to attend in person at the adjourned annual licensing meeting to apply for the renewal of her licence, and also intimating that it was the intention of the justices to oppose the renewal of the licence on the grounds, (1.) that the premises were structurally deficient and structurally unsuitable; (2.) that a licensed house at the place where the premises were situate was not required; (3.) that having regard to the character and necessities of the neighbourhood and the number of licensed houses in the vicinity the licence was unnecessary; and (4.) that in the interests of the public the renewal of the licence was not desirable. The notice was in the terms of Form 5 in the Licensing Rules, 1910.

At the adjourned general annual licensing meeting held on March 2, 1920, the solicitor appearing on behalf of the licensee applied for the renewal of the licence. Evidence was then given in support of the objection to the renewal of the licence, and after having heard the evidence of the licensee and other witnesses in support of the renewal of the licence the justices were unanimously of opinion that the question of the renewal of the licence required consideration on the second, third and fourth grounds set out in the notice of objection.

The justices therefore referred the matter to the compensation authority together with their report thereon.

Under the provisions of r. 41 of the Licensing Rules, 1910, the justices granted the renewal of the licence in accordance with the terms of the application, but inserted in the licence a statement that it was granted provisionally pursuant to the Licensing (Consolidation) Act, 1910 (1), and the rules made

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24). Sect. 17: "The licensing justices shall not refuse to an applicant the

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under that Act, and that if the compensation authority to whom the question of the renewal of the licence had been referred refused the renewal of the licence the licence would cease to have effect as from the expiration of the seventh day after the day fixed for the payment of compensation. The provisional renewal was in the terms of Form 15 in the Licensing Rules, 1910.

At the principal meeting of the compensation authority held on June 7, 1920, the compensation authority, after having

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renewal of any such justices' off-licence as is described in the First Part of the First Schedule to this Act (in this Act referred to as an old off-licence) except on the grounds specified in the Second Part of that Schedule."

Sect. 18: "(1.) The power to refuse the renewal of any such justices' on-licence as is described in the First Part of the Second Schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the Second Part of that Schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act.

"(2.) In every case of the refusal of the renewal of an old on-licence by the licensing justices, they shall specify in writing to the applicant the grounds of their refusal."

Sect. 19: "(1.) Where the licensing justices, on the consideration by them, in accordance with this Act, of applications for the renewal of justices' licences, are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon.

"(2.) The compensation authority shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices) an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Licensing Rules, 1910. Rule 41: "Where, under s. 19 of the Act, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional."

Rule 42: "If the compensation authority refuse the renewal of any licence the renewal of which is provisional, ... the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these rules for the payment of the compensation money."

heard counsel, and evidence on behalf of the justices in opposition to the renewal of the licence and counsel and evidence called on behalf of the licensee and owners in support of the renewal of the licence retired to consider their decision. On returning into Court the chairman stated that the six justices who had heard the case were equally divided, three of them being in favour of the grant of the renewal of the licence and three of them being in favour of the refusal of the licence, and that the Bench being divided no judgment was recorded. An application to adjourn the meeting was refused.

The borough justices subsequently moved for and obtained the above rule nisi.

Wootten for the licensee showed cause. Where the question of the renewal of a licence is referred to the compensation authority the jurisdiction of the compensation authority is limited to deciding whether the renewal of the licence shall or shall not be refused. The compensation authority have no power to renew the licence; that is done by the licensing justices. The compensation authority in this case being equally divided came to no decision; they have, therefore, not refused the renewal of the licence, and the licence, which was granted provisionally under r. 41 of the Licensing Rules, 1910, continues in operation. In *Ex parte Evans* (1) Lord Ashbourne pointed out that, where there has been an equal division of opinion, it would be futile for the Court to issue a mandamus to hear and determine the matter, for the very same thing might occur again; and in the Irish case of *Rex* v. *Tipperary Justices* (2) it was expressly decided that where justices in quarter sessions were equally divided and would neither make the order sought nor adjourn, the Court would not issue a mandamus requiring quarter sessions to adjourn and rehear the matter.

Cecil Whiteley for the licensing justices in support of the rule. When licensing justices have come to the conclusion that the question of the renewal of an existing on-licence

(1) [1894] A. C. 16. (2) [1903] 2 I. R. 108.

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requires consideration on grounds other than those which they can deal with, their jurisdiction as to the renewal of that licence ceases and is vested in the compensation authority, who alone can deal with the application for the renewal of the licence. The provisional renewal of a licence is not the same thing as an ordinary renewal of a licence: *Rex* v. *Walsall Justices* (1): per Lord Alverstone C.J. It is mere machinery, in the nature of a permit, to enable the sale of intoxicating liquor to be carried on on the premises until the compensation authority have dealt with the matter, and, if the renewal is refused, until the compensation money is paid: see r. 42. The jurisdiction of the compensation authority is the same as that of the licensing justices before the Act of 1904. They are bound either to refuse to renew or to renew. In this case they have done neither, and therefore the mandamus should go. [He also cited *Plaistow Working Men's Club* v. *Harrod* (2); *Rex* v. *Newington Licensing Justices.* (3)]

THE EARL OF READING C.J. In this case the licensing justices for the borough of Reigate have obtained a rule nisi calling upon the compensation authority to show cause why they should not be ordered to hear and determine an application for the renewal of a licence. The compensation authority came to no decision on the matter, in this sense, that the six justices who sat when the matter came before the compensation authority were equally divided, three being of one opinion and three of the contrary. The question is, what is the effect of there being no majority either for or against the renewal of the licence? An application had been made in the ordinary way by the holder of an old on-licence to the licensing justices at their general annual licensing meeting for the renewal of the licence. Perforce, the licensee had to apply for the renewal, and, perforce, the application had to be made at the general annual licensing meeting. No other way of obtaining the renewal of a licence is provided. The

(1) [1910] 2 K. B. 210, 224. (2) [1910] 1 K. B. 582.
(3) [1914] 2 K. B. 710.

licensing justices granted the renewal of the licence provisionally and referred the matter to the compensation authority. The decision of this case depends entirely upon the effect of that reference. It is contended on behalf of the licensee that the matter referred to the compensation authority for their determination is whether or not they will refuse to renew the licence, and that they are given no jurisdiction to grant a renewal. On the other hand it is said that the application to the licensing justices for the renewal is mere machinery, and that when the matter is referred to the compensation authority their jurisdiction is not limited to merely deciding whether or not the application for the renewal shall be refused, but that what is really referred is the whole question of the renewal and that it is for the compensation authority to decide whether the licence shall be renewed, and, therefore, that if the authority do not decide that it is to be renewed, the application for a renewal fails.

I have no doubt as to what our decision ought to be. In my opinion the reference to the compensation authority is a reference of a licence which has been provisionally renewed and all that the authority have to do is to determine whether that licence which has been provisionally renewed shall be refused, that is to say, shall be extinguished on payment of compensation. It is necessary to bear in mind that before the Licensing Act, 1904, the licensing justices had full power in the exercise of their discretion to refuse to renew an on-licence. The Act of 1904 took away that power by enacting that the licensing justices should have no power to refuse to renew an on-licence, except upon certain specified grounds. Unless a case came within one of those grounds the licensing justices were bound, after the passing of the Act of 1904, to grant the renewal of an existing on-licence. In this case it is not suggested that any ground existed which entitled the justices to refuse the renewal of the licence. It is a case in which the justices were bound to renew the licence. Mr. Whiteley has argued that the act of the justices in granting the renewal is a purely ministerial act. I agree that it is, because the licensee has a vested right to have the licence

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renewed, which right can only be got rid of on payment of compensation. But in carrying out this scheme the Legislature bore in mind that the compensation authority would not have unlimited funds at their disposal, and that they would have to consider in each case whether they would extinguish the particular licence and whether they had the means to pay compensation if they decided to extinguish it, and therefore it was provided by r. 42 that a licence which has been provisionally renewed by the licensing justices shall continue in existence until the compensation is in fact paid to the parties entitled to it. But nowhere in the Act, or in the rules or forms made under it, can I find any language which leads to the conclusion that the Legislature has conferred upon the compensation authority the power to renew a licence. On the contrary the Act and the rules and forms all compel me to adopt the view that it is the licensing justices who are to renew the licence, and the only power which the compensation authority have is to cut the thread of the renewal by the payment of compensation, and that until the compensation is paid the renewal is to continue. The compensation authority, in my opinion, have no power to grant a renewal; they have only power to refuse a renewal. I think this becomes clear if one refers to certain sections of the Licensing (Consolidation) Act, 1910. After providing in s. 16 that the renewal of a licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal, the Act in s. 18 goes on to provide that the power to refuse the renewal of an existing on-licence on any ground other than those specified is given, not to the licensing justices, but to the compensation authority, and shall only be exercised on a reference from the licensing justices, which shows that the latter have to renew the licence, and on payment of compensation. Sect. 19 further supports this view. [His Lordship read s. 19.] What is the "matter" which is referred to the compensation authority? It is the question of the renewal of the licence, in order that the compensation authority may determine, in the language of sub-s. 2 of s. 19, whether "subject to the payment of compensation," they

will "refuse the renewal of any licence to which any such report relates." I think that the language of rr. 41 and 42 and of forms 5 and 15 also makes it clear that what the compensation authority have to deal with is a licence which has been provisionally renewed by the licensing justices, and that it is only when that renewal has been granted that the jurisdiction of the compensation authority arises. That view involves the logical carrying out of the purposes of the Act, and it follows inevitably that the compensation authority have no jurisdiction to do otherwise than to refuse or not to refuse the renewal and that they have no jurisdiction to grant a renewal. It follows from that conclusion that if, as in this case, there is not a majority of the members of the compensation authority in favour of refusing renewal, the licence which had been renewed provisionally and which was to take effect only until the compensation authority should have refused the renewal and compensation had been paid, continues in operation as an ordinary licence. I cannot see that any difficulty will arise as was suggested in the course of the argument. The licence will continue in force until the next general annual licensing meeting, which will be held in April, 1921, when an application to renew the licence will again have to be made to the licensing justices, and the justices can then, if they think fit, again refer the matter to the compensation authority, and I trust that the compensation authority will in that case take care to have an odd number of justices present so that there may be a majority one way or the other. For these reasons the rule will be discharged. I only wish to add, to prevent any possible misunderstanding, that even if Mr. Whiteley had convinced me that his contention was right, and that the effect of a provisional renewal was merely to grant a time permit, he would still have had to satisfy us that a mandamus could be granted in the circumstances of this case. I very much doubt whether this Court could grant a mandamus to the compensation authority to hear and determine a matter when they have already done so. I do not decide that, for in view of our conclusions it is unnecessary, but the

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authorities cited incline me to the opinion that in the circumstances of this case a mandamus ought not to be granted. The granting of a mandamus is within the discretion of the Court, and where the matter is one which can be dealt with next year I doubt whether the Court in the exercise of its discretion ought to grant a mandamus.

DARLING and SALTER JJ. agreed.

Rule discharged.

Solicitors for the licensee: *Hobson & MacMahon.*

Solicitor for the borough justices: *Chamberlain Mole, Reigate.*

F. O. R.

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Nov. 19.

[IN THE COURT OF APPEAL.]

FLOWER *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF LYME REGIS.

[1918 F. 15.]

[POOLE DISTRICT REGISTRY.]

Bankruptcy—Annulment—Composition—Revesting of Property—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 21.

Sect. 21, sub-s. 1, of the Bankruptcy Act, 1914, provides that the creditors of a bankrupt may resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy.

By sub-s. 2 "If the Court approves the composition . . . . it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare."

The plaintiff having been adjudicated a bankrupt, his creditors agreed to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy. The amount necessary to pay the composition was deposited with the Official Receiver. The Court, having approved the composition, made an order under s. 21 annulling the bankruptcy, but did not make any order vesting any property of the plaintiff in him or in any other person. After the

annulment of the bankruptcy the plaintiff brought an action to recover a chose in action which had been legally assigned to him before the receiving order.

Held, that upon the order of annulment the chose in action revested in him and that he was entitled to sue for it.

Judgment of Shearman J. reversed.

APPEAL from the judgment of Shearman J. in an action tried before the learned judge without a jury at Dorset.

The plaintiff claimed a sum of 275*l.* originally due from the defendants to one S. S. Sanders and afterwards assigned by Sanders to the plaintiff by a document in writing dated March 31, 1914, notice of which assignment was given to the defendants by a letter dated April 8, 1914.

On March 16, 1914, Sanders had entered into a contract with the defendants to do certain repairing work in Cobb Road, Lyme Regis. The plaintiff joined in the contract as surety for Sanders, in consideration of which Sanders assigned to the plaintiff all moneys due or becoming due to Sanders under or in connection with the contract, and stipulated that the plaintiff's receipt should be a good and sufficient discharge thereof. On November 2, 1914, the defendants paid to Sanders a sum of 275*l.* in settlement of his claim under the contract of March 16.

On March 19, 1915, a receiving order in bankruptcy was made against the plaintiff, and on May 4 he was adjudicated a bankrupt. There were only two creditors in the bankruptcy, and they agreed to accept a composition of 5*s.* in the £. That amount was deposited with the Official Receiver, and on April 23, 1917, an order was made in the bankruptcy under s. 21 of the Bankruptcy Act, 1914 (1), whereby the

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 21.—(1.) "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by a majority in number and three fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs" . . . .

(2.) "If the Court approves the composition or scheme, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare."

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composition was approved and it was ordered "that the receiving order of March 19, 1915, be and the same is hereby discharged and that the order of adjudication made on May 4, 1915, against" the plaintiff "be and the same is hereby annulled."

In 1918 the plaintiff issued the writ in this action claiming the sum of 275*l.* as due to him under the assignment of March 31, 1914, and as having been paid without his authority by the defendants to Sanders.

Shearman J. gave judgment for the defendants.

The plaintiff appealed.

The *Appellant* in person having stated the above facts, the Court called upon

T. E. Haydon for the respondents. The order annulling this bankruptcy was made under s. 21. Under that section the Court may make an order vesting the property of the bankrupt in him or in such other person as the Court may appoint. This section contains no provision that in the absence of an order by the Court the property shall revert to the debtor. Sect. 29, sub-s. 2, does contain a provision to that effect, as might have been expected where there has been payment in full by the debtor or where he ought never to have been made a bankrupt. But where the debts are not paid in full there is not the same reason for revesting the property in the bankrupt in the absence of an order to the contrary. There is reason for retaining the property in the hands of the trustee in bankruptcy, so that if the debtor

Sect. 29.—(1.) "Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication.

(2.) Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order."

is concealing assets they may on disclosure still be available for the creditors. The true inference from the presence of a revesting provision in s. 29 and the absence of a revesting provision from s. 21 is that in the case of annulment following a composition the Legislature intended that the property should not revest in the debtor without a special order of the Court.

The appellant was not called upon to reply.

BANKES L.J. The question in this appeal turns upon the construction of s. 21 of the Bankruptcy Act, 1914. The only facts necessary to be stated are these :—In March, 1914, a man named Sanders entered into a contract with the respondents for making up a road. On March 31 Sanders assigned all moneys becoming due to him under that contract to the appellant, who duly gave notice of the assignment to the respondents. That assignment was absolute in form and was an absolute assignment within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873. Consequently the appellant became entitled to receive from the hands of the respondents all moneys they owed under this contract to Sanders. In November, 1914, after some dispute with Sanders they paid to Sanders direct a sum of 275*l.* in settlement of his claim. The appellant claims that money on the ground that by virtue of the assignment his was the hand to receive it, that he was the only person who could give a discharge, that the respondents had no authority to pay it to Sanders, and having done so they must now pay him.

The appellant was adjudicated a bankrupt in May, 1915, but his creditors accepted a composition of 5*s.* in the £, and on April 23, 1917, the adjudication was annulled; but no express order was made revesting in the appellant any property of his which had vested in the Official Receiver or trustee in bankruptcy. The respondents contend that in the absence of such an order the property of the appellant, including this 275*l.*, either remained in the Official Receiver or trustee in bankruptcy, or possibly lapsed to the Crown, and that at any rate the appellant has no title to it. This argument is founded on the difference in language between s. 21 and s. 29

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of the Bankruptcy Act, 1914. Sect. 29 applies where the debts have been paid in full or where the debtor ought not to have been adjudged bankrupt. The adjudication may then be annulled, and by sub-s. 2 the property of the debtor "shall vest in such person as the Court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms . . . . as the Court may declare by order." Sect. 21, which applies to the annulling of a bankruptcy where the creditors agree to a composition, is differently worded. The Court "may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms . . . . as the Court may declare." It is argued that in this case we ought not to hold that the property will revert to the debtor if no vesting order is made; because where this is intended, as in s. 29, the intention is expressed; in s. 21, it is said, there is no express provision, and therefore no intention, that property shall revert in the absence of a vesting order. It is obvious that s. 21, sub-s. 2, contemplates some order being made vesting the property, because it speaks of an order annulling the bankruptcy and vesting the property as though the same order would contain some provision effecting both these objects. The question is what is the result where the Court makes an order annulling the bankruptcy but makes no order vesting the property. We have not now to consider a case where a composition is merely agreed upon or where the money has not yet been paid or deposited and yet an order annulling the bankruptcy is made. In the case before us the composition was paid or secured at the time when the order of April 23, 1917, was made. The effect of that order was to set aside the order under which the trustee or official receiver obtained his title to the debtor's property. Is the property to be left in the air, vested in no one? I cannot think that is the proper meaning or intention of the section. In my opinion the note by the learned author of Williams' Bankruptcy Practice (1) is quite correct, that "although

(1) 11th ed. (1915), p. 98. See 3rd ed. (1884), p. 69.

there is no express provision to this effect, upon payment of the whole composition the estate of the debtor would by necessary implication revest in him"; and by the words "by necessary implication" I understand him to mean because there is no other person in whom the property could properly vest. For these reasons I think the learned judge came to a wrong conclusion and this appeal must be allowed.

Bankes L.J.

ATKIN L.J. I agree. It seems to me that the title to this debt being originally in the plaintiff by reason of the assignment could only be taken out of him by the adjudication in bankruptcy, an order for which was duly made. But, upon this scheme being approved, the adjudication was annulled. Under what circumstances then can the defendants who owe the debt say that they no longer owe the debt to the plaintiff but that they owe it to some third person? It seems to me that the title of the trustee was gone when the order was made annulling the order of adjudication, certainly when the composition, the approval of which formed part of the order, had been in fact completed.

It is not necessary to determine what the position would be under s. 21, pending the completion of a composition. It may be that the property revests conditionally in the bankrupt. It may be that the order annulling the adjudication only operates conditionally; that is to say, does not operate until the composition is completed, but we have not got to consider that point. It is inevitable that when once an order has been made, and all conditions in the order have been fulfilled, thereupon the bankruptcy is in fact annulled. If it is annulled it is impossible for the trustee in bankruptcy to say that he has any title at all.

That disposes of the matters in this action. The plaintiff was entitled to sue. Whether he had the whole beneficial interest or not is not relevant to this inquiry. Judgment must be entered for him for 275*l*.

YOUNGER L.J. I am of the same opinion. Sect. 21 of this Act, and particularly sub-s. 2 of that section, empowers

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Younger L.J.

the Court to make an order annulling the bankruptcy at a point of time when the composition on which the annulment is based has not in fact been paid. In these circumstances it is natural that the subsection should enable the Court by order to vest the property of the bankrupt not only in himself but in such other person as the Court may appoint. An order vesting the property in some person other than the bankrupt may be necessary for the purpose of securing or bringing about the final payment of the composition.

In this case an order annulling the bankruptcy was made, and it contained no provision at all with regard to the vesting of the property of the bankrupt in himself or in anybody else. It is unnecessary to consider the position of the property before payment of the composition, because in this case the composition was provided for at the date of the order. After the composition was paid, as it has in fact been, the position became clear. The trustee in bankruptcy, or as in this case the Official Receiver, then held the bankrupt's property, all the purposes of the bankruptcy, the only purposes for which the property was by statute vested in him, having been fully discharged. Those purposes did not exhaust the property, which so far as unapplied remains in his hands, free and discharged from them and all of them. The necessary result is that there is a resulting trust for the late bankrupt, certainly in equity and, if the case be put as it has been by my learned brothers, at law also the plaintiff in this case. His remaining property has been restored to him, and he was in a position to make the claim which he did make when he issued the writ in this action.

Appeal allowed.

Solicitors for respondents : *Bridgman & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1920
Dec. 3, 6.

ADAMS *v.* LONDON IMPROVED MOTOR COACH BUILDERS, LIMITED.

[1919. A. 620.]

Observations of ATKIN, L.J., at p. 503, *examined and explained.* DANISH MERCANTILE CO., LTD. *v.* BEAUMONT. [1951] 1 All E.R. 925.

Costs—Plaintiff Member of Trade Union—Solicitor instructed by Trade Union on behalf of Plaintiff—Costs of Solicitor payable out of Trade Union Funds—No Agreement by Solicitor not to hold Plaintiff liable for Costs—Right of successful Plaintiff to recover Costs against Defendants.

The plaintiff was a member of a Trade Union which provided, amongst other benefits, legal aid for members in connection with their employment. The plaintiff had duly paid all his contributions to the Union and was entitled to the benefits. The Union's funds were allocated to, amongst other objects, that of providing the legal aid mentioned above. According to the usual practice the plaintiff laid his claim against his employers, the defendants, for wrongful dismissal before the executive council of the Union, and they decided to give him legal aid, and instructed a firm of solicitors, who were the general solicitors to the Union, to act for him in the matter. The plaintiff gave no written retainer to the solicitors. There was no agreement with the solicitors that the plaintiff was not to be liable to them for their costs. They issued a writ on his behalf, and conducted the action to trial, instructing counsel on his behalf during the preliminary stages and at the trial. The plaintiff recovered judgment in the action against the defendants:—

Held, that the plaintiff was entitled to judgment with costs.

By Bankes and Atkin L.JJ.: On the ground that the Union, acting on the plaintiff's behalf, engaged the solicitors to act for him, and they became his solicitors, and he was liable to them for payment of their costs, there being no agreement with them that he should not in any circumstances be liable to them for their costs; and that liability was not excluded upon the assumption that the Union also undertook to pay the solicitors' costs.

By Younger L.J.: On the ground that there was on the facts no distinction between this case and *Rex* v. *Archbishop of Canterbury* [1903] 1 K. B. 289.

Decision of Sankey J. [1920] 3 K. B. 82 affirmed.

APPEAL from the judgment of Sankey J. at the trial of the action. (1)

The action was brought for wrongful dismissal, and the plaintiff recovered judgment for 94*l.* 10*s.* An adjournment then took place for evidence and further argument upon the question whether the plaintiff was entitled to costs.

(1) [1920] 3 K. B. 82.

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The facts were as follows: The plaintiff was a member of the National Union of Clerks, which was a trade union having amongst other objects that of providing legal aid for members in connection with their employment. The plaintiff had duly paid all his contributions to the Union, and was entitled to the benefits. (1) The Union's funds were allocated to, amongst other objects, that of providing legal aid as aforesaid. The plaintiff's claim against the defendants was, in accordance with r. 117 of the rules of the Union, duly sent to the executive council of the Union, and they decided that he was entitled to legal aid, and thereupon the General Secretary instructed Messrs. Helliwell, Harby and Evershed, the general solicitors to the Union, to act on behalf of the plaintiff in the action. Although the plaintiff gave no written retainer to the solicitors they issued a writ on his behalf, took all the necessary steps to bring the action to trial, and instructed counsel both during the preliminary stages and at the hearing of the action. Sankey J. found that the Union acted as the plaintiff's agent in retaining and instructing the solicitors, and that the solicitors accepted the retainer and instructions on the plaintiff's behalf. He accordingly held that the plaintiff was entitled to judgment with costs against the defendants.

The defendants appealed.

Barrington-Ward K.C. and *David White* for the defendants. No retainer was given by the plaintiff to the solicitors. The solicitors looked solely to the trade union, of which the plaintiff was a member and in which he was entitled to benefits, including legal aid, for payment of their costs. They acted as solicitors for and were retained by the Union, and the plaintiff was under no liability to them. The solicitors could not have sued him for their costs. There was never any contractual relation between the solicitors and the plaintiff under which the solicitors were contractually liable to the plaintiff for the conduct of the action, or could sue the plaintiff for their

(1) Rules 89 and 117 of the rules of the Union, which deal with this matter, are set out in the judgment of Bankes L.J.

costs. An order might be obtained to dismiss the action if there was no authority in the solicitors to bring it: *Porter* v. *Fraser* (1); *Newbiggin Gas Co.* v. *Armstrong* (2); *Yonge* v. *Toynbee* (3); *Fernée* v. *Gorlitz.* (4) Upon the evidence the right inference is that the solicitors were retained solely by the Union and not by the plaintiff. Party and party costs being awarded as an indemnity—*Gundry* v. *Sainsbury* (5); *Harold* v. *Smith* (6); *Hockley* v. *Bantock* (7)—the plaintiff is not entitled to recover them from the defendants. [*Henderson* v. *Merthyr Tydfil Urban Council* (8) was also cited.]

Cyril Atkinson K.C. and *Kyffin* for the plaintiff. This case is covered by the decision in *Rex* v. *Archbishop of Canterbury.* (9) In that case the Crown intervened in a proceeding against the Archbishop—a rule for a mandamus—on the ground that the Crown had an interest in the matter, and the Treasury Solicitor was directed to take up the case of the Archbishop, and he became the solicitor on the record. The rule was discharged, costs being allowed to the Archbishop. Upon taxation the question of the Archbishop's right to costs was raised. The Court of Appeal held that, though the Crown neither pays nor receives costs, the Archbishop was entitled to costs. The Court considered that the Archbishop was liable for costs, the Treasury Solicitor becoming his solicitor on the record. This appears clear from all the judgments in the case. In *Gundry* v. *Sainsbury* (5) the plaintiff had agreed with his solicitor that he was not to pay the latter any costs. There was no such agreement in the present case. The Union instructed their solicitors to act for the plaintiff, and all the steps in the action were taken by the solicitors as acting for the plaintiff. The Union were his agents in the matter. The solicitors would be liable to the plaintiff for negligence in the conduct of the action; if the Union were insolvent, the plaintiff would have to pay

(1) (1912) 29 Times L. R. 91.
(2) (1879) 13 Ch. D. 310.
(3) [1910] 1 K. B. 215.
(4) [1915] 1 Ch. 177.
(5) [1910] 1 K. B. 645.
(6) (1860) 5 H. & N. 381, 385.
(7) (1833) 2 My. & K. 437, 439.
(8) [1900] 1 Q. B. 434.
(9) [1903] 1 K. B. 289.

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the solicitor's costs; if the plaintiff recovered his costs, he could not refuse to hand them over to the solicitors; if an offer of compromise were made in the course of the action which the plaintiff accepted, the solicitors would be bound to obey the plaintiff. These four tests show that the Union acted as the plaintiff's agents in instructing the solicitors, the Union merely indemnifying him against the costs. The decision of the learned judge was therefore right. [Sect. 4 of the Solicitors Act, 1870 (33 & 34 Vict. c. 28), was referred to.]

Barrington-Ward K.C. in reply.

BANKES L.J. In this case the plaintiff brought an action for wrongful dismissal, and Sankey J. gave judgment for him for 94*l.* 10*s.* with costs. The defendants contend that the learned judge ought not to have given the plaintiff his costs, upon the ground that he was under no liability to the solicitors for the costs, and therefore was not entitled to recover costs against the defendants. The facts are these: The plaintiff was a member of the National Union of Clerks, which provides for its members, amongst other benefits, legal aid. Rule 89 of the rules of the Union provides: "Any member to be eligible for benefit, including legal aid and trade benefit, but excluding benefit from the Benevolent Fund, must have been clear on the books on the Saturday prior to the date of his claim and have paid at least six consecutive months' contributions." The plaintiff complied with those conditions, and was therefore, under the rules, entitled to benefit, including legal aid. Rule 117 provides: "Any member, not disqualified for benefit under rr. 21 and 89, may claim legal assistance through the Union in any matter concerning his employment. Such claim, accompanied by a full and true statement of the facts of the case, shall be addressed to the Branch Secretary, who shall at once forward it, with a statement of any further facts he may deem necessary, to the General Secretary. The General Secretary shall present the claim as soon as possible to the Executive Council, which shall take such steps to deal therewith as may be deemed advisable."

The plaintiff's claim came before the council, and they decided that he was entitled to legal aid, and thereupon through the general secretary they gave the necessary instructions to their solicitors. The firm of Helliwell, Harby and Evershed act as solicitors for the Union. The practice of the Union with reference to such matters as stated by the learned judge appears in the statement of facts in the report in the Law Reports (1): "The usual practice was that when a dispute likely to lead to legal action occurred the proposed plaintiff wrote to the general secretary of the Union, and he, in turn, engaged a solicitor or (as in the present case) a firm of solicitors, on behalf of the plaintiff. The solicitors' costs were payable out of the Union's funds. Although the plaintiff gave no written retainer to them the solicitors issued a writ on his behalf, took all the necessary steps to bring the action to trial, and instructed counsel both during the preliminary stages and at the hearing of the action. The Union acted as the plaintiff's agent in retaining and instructing the solicitors, and the solicitors accepted the retainer and instructions on the plaintiff's behalf and were entitled to be paid their costs out of the funds contributed to by him." A writ was issued, and the indorsement on the writ states that "this writ was issued by Helliwell, Harby & Evershed, whose address for service is Thanet House, 231, Strand, W.C. 2, solicitors for the said plaintiff."

The principle upon which costs as between party and party are allowed is that the costs are awarded to the person claiming them as an indemnity. That being the principle, it follows that any one who is not in a position to claim to be indemnified is not entitled to an order for party and party costs. It is said here that the plaintiff was not in a position to claim an indemnity, for two reasons, as I understand: one is that the firm who purported to act as his solicitors were not his solicitors at all; that they were the solicitors for the Union, and their only instructions were to act as solicitors for the Union. The other is that, assuming the Union instructed the solicitors to act as solicitors for the plaintiff, yet

(1) [1920] 3 K. B. 83.

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it was upon the terms that the solicitors should look solely to the Union, and not to the plaintiff, for payment of their costs. Sankey J. held that neither contention was well founded upon the facts. He came to the conclusion that the solicitors were engaged to act as solicitors for the plaintiff by the Union, and that in so engaging the solicitors, the Union were acting as the agents of the plaintiff. In my opinion that view is correct. The learned judge also found that there had been no arrangement either by the Union or by the solicitors or by the plaintiff, that the solicitors should not, under any circumstances, look to the plaintiff for payment of their costs. With that conclusion upon the facts I also agree.

I arrive at my opinion by these steps: First, who engaged the solicitors? The answer is the Union. Next, for whom did the Union engage the solicitors to act? As solicitors for the Union or as solicitors for the plaintiff? It seems to me to be impossible on the facts to come to any other conclusion than that the Union engaged the solicitors to act in the matter as solicitors for the plaintiff. The solicitors issued the writ, and they made the statement in the indorsement that they did so as solicitors for the plaintiff. When Mr. Evershed, a member of the firm of Helliwell, Harby & Evershed, who issued the writ, was called, the defendants, who were asserting that it was a misstatement, and that his firm were not acting as solicitors for the plaintiff, but for the Union, did not ask him a single question on the subject. Nor was the plaintiff asked whether the solicitors were acting as his solicitors or not. It seems to me, upon those facts, only one conclusion is possible—namely, that the solicitors were engaged to act as solicitors for the plaintiff.

The next question is, upon what terms were they employed? Both the plaintiff and Mr. Evershed were asked some questions about that. But if, as I think, it is essential for the defendants' case that they should establish that the terms upon which the solicitors were engaged included the term that under no circumstances should they look to the plaintiff, it seems to me that the evidence falls entirely short of what was necessary to establish that case. [The Lord

Justice referred to the evidence.] When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the Union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs. In my opinion the evidence falls short of establishing that necessary fact, without which the defendants are not entitled to succeed. On these grounds I think that the learned judge's decision was right.

I wish to say a word about a passage in the learned judge's judgment from which it might possibly appear that he was influenced by the fact that the plaintiff contributed to the funds of the Union from which the remuneration of the solicitors would come. I cannot think that the learned judge intended that passage to bear that meaning; but, be that as it may, it does not seem to me that the fact that the plaintiff contributed a very small sum to the fund out of which the solicitors would be paid makes any difference.

With regard to *Rex* v. *Archbishop of Canterbury* (1) it seems to me that that case proceeded on the assumption that the Archbishop was under a liability to the solicitor, even though he never might be called upon to make that liability good.

For these reasons, in my opinion, the appeal must be dismissed.

ATKIN L.J. I agree. The plaintiff brought an action against his employers to recover damages for wrongful dismissal. In that action he was represented by a firm of solicitors who acted for him throughout. The case was brought to trial and judgment given for the plaintiff. It was then suggested that the learned judge ought not to give the plaintiff his costs because it was said that he was under no liability to the solicitors in the action to pay those costs.

(1) [1903] 1 K. B. 289.

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In order to make good that contention, the plaintiff must show either that there was no employment by him of the solicitors in the action, so that they were not his solicitors, or that, if there was such an employment, he had made a binding agreement with them, express or implied, that he was not to pay any costs. The question is whether the defendants have established either of those propositions.

The facts were that the plaintiff was a member of a trade union, having a right to receive legal assistance from his trade union; and having laid his case before the executive council of the Union, they decided to give him legal assistance, and they appointed their solicitors to conduct the case, as the learned judge says, on his behalf. It seems to me that the learned judge was correct in finding that the solicitors in the action acted as the plaintiff's solicitors, and that the plaintiff employed the solicitors. To constitute a retainer there need not be an express agreement in writing with a solicitor to employ him. In all such cases it is sufficient to show that the agent, whether he is a professional man or whatever his employment may be, was in fact employed by the principal. In this case it appears to me from the admitted facts that there is only one inference possible—namely, that the plaintiff did in fact employ the solicitors as his solicitors in the action. He was sent to them; the writ was issued by them in the plaintiff's name, with their names upon it as acting as solicitors for the plaintiff. He knew throughout the proceedings that they were purporting to act as his solicitors. He was made acquainted with the proceedings at every stage. The solicitors communicated with him and sent him an affidavit to be sworn, and he appeared and gave evidence in the action and was examined by counsel instructed by the solicitors on the record. If there had been no antecedent communication at all with the solicitors, it appears to me that the only inference that one could draw from those facts would be that the plaintiff in fact had ratified the act of the solicitors in acting as his solicitors.

It appears to me therefore that the learned judge was

perfectly correct in saying that the solicitors were in fact acting as solicitors for the plaintiff. If they were so acting, they did so upon the ordinary terms applicable to a person who employs a professional man to do professional work on his behalf—namely, that he shall remunerate him. That is the prima facie obligation which at once emerges when the employment is proved. It is perfectly possible for the agreement of employment to contain a term by which the agent agrees that he will not claim remuneration from his employer, but will either do the work for nothing or claim remuneration from some third party. But in the absence of such a term—which would have to be proved by the party setting it up—the ordinary deduction from the employment of a professional man accepted in this way is that the person accepting the agent's services is bound to remunerate the agent.

I should like to point out that it seems to follow that, if the defendants had been successful in their contention that there was no employment by the plaintiff of the solicitors, the result would be that the action would be a nullity; it would be brought in the name of a plaintiff who had given no authority to bring an action for him; and the defendants would have the right to have the proceedings stayed, and I presume to have the usual order that the solicitors pay the costs of both parties. That is an application that can be made equally by the defendant or by the plaintiff: see *Geilinger* v. *Gibbs* (1); *Cape Breton Co.* v. *Fenn.* (2) I do not stop to discuss those cases, but it seems to me to follow from the fact of the action being brought without the authority of the plaintiff that it is, so far as the defendants are concerned, a nullity.

The only other question is whether or not there was any agreement proved by the defendants that the solicitors were not entitled to receive remuneration from the plaintiff. To my mind no such agreement was proved. Preliminary to that question I should like to say this: The plaintiff was, under the rules of his trade union, entitled to indemnity as to legal costs from the Union; and the Union chose for their

(1) [1897] 1 Ch. 479. (2) (1881) 17 Ch. D. 198.

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member the solicitors. In these circumstances I think that it is highly probable, though the matter has not been discussed, that the solicitors have a personal right against the trade union to receive a proper remuneration for their services. It has not been discussed, and we do not know the precise terms of the relation between the trade union and the solicitors, but I will assume that there exists such an obligation. Nevertheless there is nothing inconsistent in that obligation co-existing with an obligation on the part of the plaintiff to remunerate the solicitors. Naturally, as a matter of business, the solicitors would, I have no doubt, apply in the first instance to the trade union, as being the persons ultimately liable to pay the costs as between all parties—that is to say, the persons who would have to indemnify the plaintiff against the costs. But that does not exclude the liability of the member, and it seems to me not in the least to affect the position that the client may be liable, although there may be a third person to indemnify the client. It appears to me that that state of things would account for the whole of the evidence that was given. But I feel satisfied of this: that upon the direct evidence in the case it would be wrong to draw the conclusion that there was an express bargain that the plaintiff was not to be liable to the solicitors for the costs incurred; and quite apart from the express evidence that no such arrangement had been made, it appears to me that there was no evidence given on behalf of the defendants that an express arrangement to that effect had in fact been made.

For these reasons it appears to me that the appeal should be dismissed. I, like my Lord, think that there is only one passage in the judgment of the learned judge which is at all exposed to comment, and that is the passage in which, after saying that "no such agreement was come to in the present case," he said: "The facts of which were that the solicitors were entitled to be paid their costs out of the fund contributed to by the plaintiff, and there was no arrangement to the contrary." I think the probability is that that sentence would fall into its proper perspective if the learned judge had

inserted it in the place where it is to be found in the statement of facts in the Law Reports—namely, "that the learned judge found that the Union acted as the plaintiff's agent in retaining and instructing the solicitors, that the solicitors accepted the retainer and instructions on the plaintiff's behalf and were entitled to be paid their costs out of funds contributed to by the plaintiff." I think it is probably true that in this case the solicitors were entitled to be paid their costs by the trade union, and in that sense to be paid out of funds contributed to by the plaintiff, but it does not appear to me that that fact had any bearing on the actual reason for deciding the case.

YOUNGER L.J. I am not sorry that in the result this appeal will be dismissed, because I feel that these costs were properly incurred in the prosecution of the action, and it would be unfortunate if, for any technical reason, the defendants were relieved from the proper burden of paying them. I feel however a little more difficulty in relation to the facts of the case than is shared by my brothers, although it appears to me that there is authority binding upon this Court which leads to the result which on the facts as they see them necessarily follows.

First of all it is settled that a plaintiff, having obtained an order for party and party costs, is only entitled as against the defendants to recover the costs which he is himself liable to pay to his solicitors. The plaintiff's solicitors' position in relation to the plaintiff here appears to me to be this. These solicitors were not solicitors pro hac vice of the Union; they were the general solicitors of the Union, and their intervention in this litigation was due, as I think, exclusively to that fact. By r. 117 of the rules of the Union the plaintiff is entitled to legal aid upon complying with certain conditions; these were complied with in this case; and, although not expressly stated, it is a necessary implication of that rule, as I read it, that he is entitled to legal aid without further payment by him. Legal aid is one of the benefits he receives in respect of his contributions to the Union. The evidence is that when a

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question arises between a member of the Union and his employer, and the matter is indorsed by the governing body through the general secretary, the solicitors of the Union, on instructions from the general secretary, take it up; and I should feel inclined to infer very strongly from this (and I think it is supported also by the evidence of the solicitors) that the solicitors, taking up on behalf of the member a matter referred to them by the general secretary, do so with full knowledge of the rules, and of the benefits thereunder to which the member is entitled, and therefore presumably take it up upon the terms that for their work they will be paid under their general employment by the Union; and that, so far as the member is individually concerned, he is, as between him and them, as free from personal liability for those costs as any other member of the Union. That would appear to me to be primarily what I should suppose to be their position whilst acting as the general solicitors of the Union in relation to a dispute between a member and his employer, brought to them by the general secretary. What then was the position of the plaintiff when he applied to the general secretary? There again I think I should be inclined to conclude that he applied to the general secretary under the privilege reserved to him by r. 117, and he must be taken to have given the general secretary full authority to use his name in connection with the vindication of his rights in relation to the dispute then to be taken up by the Union on his behalf. He thus obtained, without further payment to the solicitors, the benefit to which under the rules he was entitled. I am not satisfied that in point of fact the learned judge has found anything more than what I have said. I doubt whether one must trust too much to the statement that he makes as appearing on p. 83 of the report in the Law Reports (1), that the general secretary engaged the solicitors on behalf of the plaintiff. If that passage is pressed too far, it would appear that the learned judge thought that the general secretary employed this firm of solicitors, who had no other connection with the

(1) [1920] 3 K. B. 83.

Union, to act for the plaintiff in this dispute. I do not think that the learned judge could have intended so to find, because it was not through any such separate or special selection that the solicitors came to act in this matter. I am therefore rather inclined to attach more importance than my learned brothers do to the statement in the learned judge's judgment in which he seems to arrive at the conclusion that the defendants are liable for costs, on the ground that those costs would otherwise come out of the trade union funds, to which the plaintiff, as a member entitled to benefits, has himself contributed. I think however that, if the principle is that of indemnity, and that is the only ground upon which the plaintiff's claim to recover costs against the defendants can be established, he certainly on that ground would be entitled to no further costs than those represented by the amount of his own contributions to the fund out of which the total costs were to come. But I am not satisfied that the learned judge had that distinction clearly in his mind; he may indeed have been influenced, in stating his conclusion, by *Henderson* v. *Merthyr Tydfil Urban Council* (1), with which he was familiar, having been counsel in the case. But although the learned judge may not, in fact, have found that this work was undertaken on the instructions of the plaintiff, so that the plaintiff became liable, as between himself and the solicitors, to pay the costs, irrespective of his rights under the rule—and for the reasons I have given I would have great difficulty in arriving at the conclusion that that was the true relation between the parties—nevertheless I can see no distinction, even on the view that I take of the facts, between this case and *Rex* v. *Archbishop of Canterbury* (2); and if it was possible for the Court of Appeal in that case to come to the conclusion that in some event it was arranged between the parties that the Archbishop should be liable to the Treasury Solicitor for costs, then it appears to me that it is not difficult to conclude that in the present case there must have been some way in which this member of this trade union was to be liable to the solicitors of the Union for his costs.

(1) [1900] 1 Q. B. 434. (2) [1903] 1 K. B. 289.

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I think, with my Lord, that the view of the Court of Appeal in *Rex* v. *Archbishop of Canterbury* (1) was that it must have been assumed on all sides that there was some remote liability on the part of the Archbishop which remained; and if that was a proper assumption in that case, it is undoubtedly a proper assumption in this; all the more so because there are the facts to which my Lord and Atkin L.J. have alluded which make this case stronger.

Therefore I concur in the conclusion which has been expressed by my Lord and the Lord Justice. Before parting with the case, I desire to say one thing: I think it would be unfortunate if it were to be supposed, as the result of the decision in this case, that members of trade unions, who contribute to the funds of their Union, should be in the position that, notwithstanding their contributions to the funds and the legal aid which is promised them in consideration thereof, they nevertheless are to be supposed to remain liable for the costs of litigation incurred on their behalf. That, I understand, is not really the true effect of this decision; it is only that that may be the result if the trade union itself is not able to provide the funds; and I understand that in nearly all cases there is no danger of that happening.

Appeal dismissed.

Solicitors for plaintiff: *Helliwell, Harby & Evershed.*
Solicitors for defendants: *White & Co.*

(1) [1903] 1 K. B. 289.

W. F. B.

GOULD AND COMPANY, LIMITED *v.* HOUGHTON.

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Oct. 19, 20;
Dec. 21.

Justices—Offence punishable on summary Conviction—Aiding and abetting therein—Limit of Time for taking Proceedings—Applicability to Charge of aiding and abetting—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19.

An accessory before the fact to a misdemeanour (which includes offences punishable on summary conviction) is for the purpose of conviction to be regarded as a principal offender.

The appellants, wholesale dealers, were charged with aiding and abetting G., a customer whom they had supplied with an article of food, in the offence under the Sale of Food and Drugs Acts, to which the latter pleaded guilty, of selling that article to the respondent, it being adulterated, but sold by G. as received from the appellants. It had been purchased by the respondent from G. for test purposes, and by s. 19 of the Sale of Food and Drugs Act, 1899, a "prosecution under" those Acts in the above circumstances could not be instituted after the expiration of twenty-eight days after the purchase. The proceedings against the appellants had been instituted more than twenty-eight days after:—

Held, that as the appellants were accessories to G.'s offence, which was a misdemeanour, they were to be regarded as principals, and as such were entitled to the benefit of s. 19 of the Act of 1899, and that, accordingly, the proceedings against them were out of time.

Per Darling J. For some purposes of indictment and procedure the distinction between principals and accessories in misdemeanours exists: and accessories may be indicted and tried separately.

CASE stated by justices of Richmond, Surrey.

On April 12, 1920, the respondent, Robert Alfred Houghton, an inspector under the Sale of Food and Drugs Acts, preferred an information against Arthur Frank Gore charging that he did on March 24, 1920, unlawfully sell to the prejudice of the respondent an article of food, to wit, port (flavour) wine which was not of the nature, substance, and quality of the article demanded by the respondent, but was adulterated with $10\frac{1}{2}$ grains of salicylic acid per pint contrary to s. 6 of the Sale of Food and Drugs Act, 1875. The respondent had purchased the wine for test purposes.

At the hearing of the summons on April 29, 1920, Gore pleaded guilty to the above charge.

It was submitted on his behalf in mitigation that he had sold the above article in the said condition as he received

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it from the appellants, H. Gould & Co., Ld., in ignorance that it contained salicylic acid in the quantity revealed by the analysis. Upon this statement the justices adjourned the case and suggested that the appellants should be summoned.

On May 6, 1920, a summons was issued against the appellants charging that they did on March 24, 1920, unlawfully aid, abet, counsel and procure Gore in the commission of the above offence and the summons was made returnable on May 13, 1920.

At the hearing on May 13 it was contended on behalf of the appellants that by reason of the provisions of s. 19 of the Sale of Food and Drugs Act, 1899 (1), limiting the time for taking proceedings to twenty-eight days from the time of the purchase of the article of food, the present proceedings against them were out of time.

On behalf of the respondent it was contended that the prosecution of the appellants was not instituted under the Sale of Food and Drugs Acts, but under s. 5 of the Summary Jurisdiction Act, 1848 (2), proceedings under which by s. 11 could be commenced at any time within six months from the time when the matter of complaint arose.

The justices (para. 7) were of opinion that s. 5 of the Act of 1848 applied, and that the proceedings were in time, but in view of the fact that the proceedings were novel they adjourned the hearing without hearing evidence or going into the facts and stated this case.

The question for the opinion of the Court was whether the justices were right.

(1) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19, sub-s. 1: "When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof . . . . shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

(2) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5: "Every person who shall aid, abet, counsel, or procure the commission of any offence . . . . punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is . . . . by law liable."

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Patrick Hastings K.C. and *Frampton* for the appellants. The proceedings against the appellants were out of time, for s. 19 of the Sale of Food and Drugs Act, 1899, provides that in respect of the purchase of an article of food or drug for test purposes, "any prosecution under the Sale of Food and Drugs Acts in respect of the sale" shall not be instituted after the expiration of twenty-eight days from the time of purchase. These proceedings were instituted more than twenty-eight days after.

[THE EARL OF READING C.J. What jurisdiction have we to hear this case? The justices do not appear to have decided anything; there is no conviction or determination.

Cecil Whiteley for the respondent. The appellants took the point before the justices that the proceedings were out of time, and the justices came to a "determination" on the point within the meaning of s. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and the appellants being aggrieved thereby got the justices to state the case. This case was stated to save expense.

THE EARL OF READING C.J. This Court has only a limited jurisdiction to hear cases stated by justices, and cannot do so merely to save expense. However the justices appear to have determined this point, therefore we will hear the case; but it must not be taken as a precedent in other cases.]

Sect. 19 of the Act of 1899 is a re-enactment with alterations of s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), which limits the time for taking proceedings to twenty-eight days from the time of "the purchase from such person," i.e., the person from whom the purchase for test purposes was made, which might limit the application of the section to principal offenders only; but these words are not in the Act of 1899.

[*Cook* v. *White* (1) and *Whitaker* v. *Pomfret Brothers* (2) were referred to.]

By s. 5 of the Summary Jurisdiction Act, 1848, a person aiding and abetting a misdemeanour may be charged with the

(1) [1896] 1 Q. B. 284. (2) [1902] 1 K. B. 661.

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principal offender or before or after his conviction, and is liable to the same punishment as the principal offender, and is therefore entitled to the benefit of s. 19 of the Act of 1899. In *Du Cros* v. *Lambourne* (1), the converse case, it was held that a person charged as a principal could be convicted for aiding and abetting under s. 5 of the Act of 1848.

Cecil Whiteley for the respondent. Two courses were open to the prosecution, either to charge the appellants as principals, in which case they could have been convicted of aiding and abetting, or to charge them with the latter offence. If charged as principals they would have been entitled to the benefit of s. 19 of the Act of 1899. But they were not charged as principals but with the substantive common law offence of aiding and abetting, and not under the Sale of Food and Drugs Acts, but under the procedure prescribed by s. 5 of the Summary Jurisdiction Act, 1848, and therefore under s. 11 of that Act the proceedings could be brought at any time within six months. Whether or not a person guilty of aiding and abetting in the sale of an article has the benefit of s. 19 of the Act of 1899 depends, therefore, on the procedure adopted. It is no hardship on the appellants that s. 19 does not apply, for that only puts them in the same position as if proceeded against for giving a false warranty, in which case the proceedings could be taken within six months: *Whitaker* v. *Pomfret Brothers*. (2) The limitation of twenty-eight days was imposed in order to insure the continued existence of the article of food for the purposes of analysis, and was not intended as a personal advantage to the principal offender. This is not a "prosecution under the Sale of Food and Drugs Acts" within the meaning of s. 19 of the Act of 1899, which refers to prosecutions for offences created by those Acts. This was the offence of aiding and abetting an offence created by those Acts, not the offence of committing an offence so created.

Hastings K.C. in reply. This was a "prosecution under the Sale of Food and Drugs Acts," because the appellants were principals, there being no such thing as an accessory in a

(1) [1907] 1 K. B. 40. (2) [1902] 1 K. B. 661.

misdemeanour : *Reg.* v. *Burton* (1) ; *Du Cros* v. *Lambourne* (2), per Lord Alverstone C.J. ; Russell on Crimes, 7th ed., vol. i., p. 138.

[DARLING J. referred to Halsbury's Laws of England, vol. ix., p. 248, art. 526.]

Sect. 5 of the Summary Jurisdiction Act, 1848, does not create a new offence but deals with procedure only : *Stacey* v. *Whitehurst* (3), per Willes J.

[*Cecil Whiteley.* I did not contend that s. 5 created the substantive offence. I said that the aiding and abetting was an offence at common law.]

There is no such thing as the substantive offence of aiding and abetting a misdemeanour, and a person accused thereof is a principal. It is not necessary in such a case to prove that the principal offender is guilty in order to convict the accessory, for both are principals : *Reg.* v. *Burton* (1) ; Archbold's Criminal Pleadings, 25th ed., p. 1371.

Under s. 9, sub-s. 2, of the Motor Car Act, 1903 (3 Edw. 7, c. 36), a person prosecuted for exceeding the speed limit is entitled to notice of an intended prosecution ; according to the argument for the respondent a person accused of aiding and abetting the offence, although he could be prosecuted, would not be entitled to the notice, although in most cases he would have done less than the principal offender.

1920. Dec. 21. THE EARL OF READING C.J. read the following judgment : On April 12, 1920, proceedings were instituted by the respondent Houghton, an inspector under the Food and Drugs Acts, against Arthur Frank Gore for having on March 24, 1920, sold an article of food which was adulterated contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. Houghton had purchased the article from Gore for test purposes. Upon the hearing of the summons on April 29, 1920, Gore pleaded guilty.

On May 6, 1920, proceedings were instituted against H. Gould & Co., Ld., the appellants, for that they did

(1) (1875) 13 Cox C. C. 71.
(2) [1907] 1 K. B. 40, 44.
(3) (1865) 18 C. B. (N. S.) 344, 351, 355.

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"unlawfully aid, abet, counsel and procure Arthur Frank Gore" in the commission of the said offence on March 24, 1920. On May 13, 1920, the date returnable for the hearing of the summons, the appellants took objection that the proceedings against them were out of time by virtue of s. 19 of the Sale of Food and Drugs Act, 1899. The material part of the section is in the following words: "When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof . . . . shall not be instituted after the expiration of twenty-eight days from the time of the purchase." The proceedings against the appellants were instituted after the expiration of twenty-eight days from the time of the purchase and the appellants therefore claimed that the summons should be dismissed. On behalf of Houghton, the respondent, it was contended that the proceedings against the appellants were not proceedings to which this section applied but were proceedings instituted under s. 5 of the Summary Jurisdiction Act, 1848. The material words of this section are: "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable. . . . ." The justices were of opinion that the prosecution was instituted under s. 5 of the Summary Jurisdiction Act, 1848, and that consequently s. 19 of the Sale of Food and Drugs Act, 1899, had no application to these proceedings. They upheld the respondent's contention, but stated a case for the opinion of this Court before proceeding further with the hearing.

The facts have not yet been ascertained and it has not been established that the appellants did participate in the offence committed by Gore, but in the arguments before this Court it has been assumed that evidence would be available to prove that the appellants aided and abetted, counselled or

procured the commission of the offence by Gore. It is not however suggested that the appellants were in any sense present when Gore committed the offence; therefore, the part taken by the appellants would be that of accessories to or before the fact and not that of principals in the second degree, and it cannot be disputed that in misdemeanours (and treason) all who take part in the offence *may* be proceeded against as principals. Misdemeanour in this connection is not limited to indictable misdemeanours, for guilty participation in any offence punishable by summary conviction is a misdemeanour within this principle of law: *Du Cros* v. *Lambourne*. (1) It is admitted at the bar that the appellants could have been lawfully prosecuted as principals either together with Gore or before or after Gore's conviction by virtue of the Summary Jurisdiction Act, 1848, s. 5, and the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 8, and I would add, under the common law, for the statutes are in this respect declaratory of the common law: Lord Alverstone C.J. in *Du Cros* v. *Lambourne*. (2) If the appellants had been convicted with Gore or otherwise as principals they, equally with Gore, would have been entitled to the protection of the twenty-eight days' limitation of time under s. 19 of the Sale of Food and Drugs Act, 1899. So far no difficulty arises, but it is contended that this section has no application to proceedings against the appellants for having committed a misdemeanour at common law—namely, aiding, abetting, counselling or procuring Gore to commit an offence under s. 6 of the Sale of Food and Drugs Act, 1875. It is, therefore, contended that this limitation of time has no application to the present case and that these proceedings could be instituted within six calendar months from the time when the complaint arose: Summary Jurisdiction Act, 1848, s. 11.

No authority can be cited for this proposition and in my judgment it is unsound. The contention is that although the twenty-eight days' limitation of time would be a fatal objection if the appellants were charged as principals, it has no

(1) [1907] 1 K. B. 40. (2) Ibid. 40, 44.

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application to the present proceedings, because the appellants are charged with aiding and abetting, counselling and procuring. That means that upon precisely the same evidence the appellants would be entitled to the benefit of the twenty-eight days' limitation of time if they were charged in the summons as principals, but would lose the benefit of it if they were charged as aiders, abettors, counsellors or procurers. This result would, in my judgment, be contrary to the common law and the statute law. The authorities show conclusively that whatever the language used to denote the specific offence charged, or the part taken by the accused in the misdemeanour, the true principle of law is that expressed by Willes J. in *Stacey* v. *Whitehurst* (1): "In cases of treason, and in offences which are less than felony, every one who in cases of felony would be a principal in the second degree, or an accessory, is a principal"; that is, as I understand it, that although in fact the accused has not committed the misdemeanour but has only aided, abetted, or counselled or procured its commission, yet he is to be treated in law as if he had taken the same part as the active perpetrator of the facts constituting the offence.

At a meeting of the judges held in Hilary Term, 1843, when considering *Reg.* v. *Moland* (2), all the judges were of opinion that in misdemeanours and in treason all who take part in the crime are principals. This law seems to have been well established long before 1843, for in Sir Matthew Hale's Pleas of the Crown, vol. i., p. 613, ch. 55, treating of principals and accessories in felony, the learned author points out that in high treason all participators are principals and then proceeds: "In cases that are criminal, but not capital, as in trespass, mayhem, or praemunire, there are no accessaries, for all the accessaries *before*, are in the same degree as principals. . . . . It remains, therefore, that the business of this title of principal and accessary refers only to felonies." Blackstone's Commentaries (vol. iv., 21st ed., p. 36) says: "In all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons

(1) 18 C. B. (N. S.) 344, 355.

(2) (1843) 2 Moo. C. C. 276.

concerned therein, if guilty at all, are principals." Again, in *Reg.* v. *Greenwood* (1) Talfourd J. held it clear that in misdemeanours an absent participator is a principal, but in view of certain decisions he reserved the case for the Court of Criminal Appeal, where his opinion was confirmed. Pollock C.B. affirmed the law as expressed by Talfourd J. Erle J. said (2): "The principle on which the learned judge acted at the trial is, I apprehend, one of universal application; that all persons who are concerned in the commission of a misdemeanor are principals," and the Court was of opinion that where decisions were not in accordance with this proposition, the judges had not borne in mind this difference in principle between cases of misdemeanour and cases of felony. In *Reg.* v. *Burton* (3) it was again held that in misdemeanours all participants are principals. It would appear from the brief report that the Court consisted of Kelly C.B., Blackburn J., Brett J., Cleasby B. and Archibald J. In answer to the argument that the principal having been acquitted by the jury they could not convict Burton who was an accessory only, Blackburn J. said (4): "Is there such a person as an accessory in point of law in a misdemeanor? Both Summers and Burton were principals in this charge"; and the Court treated the question as indisputably admitting only of a negative answer and affirmed the conviction.

In recent years this principle of law has been several times considered by the King's Bench Division. In *Reg.* v. *Waudby* (5) Lord Russell of Killowen C.J. said: "Where a person is charged with aiding and abetting, if he is found guilty of aiding and abetting a misdemeanour, he is guilty as a principal, for there are no degrees of guilt in misdemeanour," and held that there being no secondary guilt in misdemeanour the prisoner was a principal offender. All the members of the Court concurred.

Du Cros v. *Lambourne* (6) is a direct authority of this Court for the proposition that a person who has aided and abetted

(1) (1852) 5 Cox C. C. 521.
(2) Ibid. 523.
(3) 13 Cox C. C. 71.
(4) Ibid. 75.
(5) [1895] 2 Q. B. 482, 483.
(6) [1907] 1 K. B. 40.

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the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted on an information which charges him with having committed the offence as principal offender. Lord Alverstone C.J. said (1): "It is important . . . . to bear in mind that in the case of crimes other than felonies there is no distinction between a principal offender and aiders and abettors . . . . there is no such person as an accessory in point of law in a misdemeanour. . . . ." And further on (2): "Keeping in view the fundamental distinction between felonies and misdemeanours and the impossibility of there being in the case of misdemeanours accessories or aiders and abettors as distinct from principals, one finds that s. 5 of the Act of 1848 provides that a person aiding and abetting may be charged with the principal offender and is liable to the same punishment." Ridley and Darling JJ. agreed. In a later case, *Rex* v. *De Marny* (3), Lord Alverstone, in a Court of five judges, again affirmed the proposition that in misdemeanours persons who aid and abet, counsel or procure the commission of an offence are themselves principal offenders. The other four judges concurred in his opinion and the reasons for this decision.

From these authorities it is, in my judgment, conclusively established that an accessory before the fact to the commission of a misdemeanour is to be regarded in law for the purpose of conviction as a principal offender. No doubt the terms "accessory" and "principal in the second degree" are sometimes used in reference to cases of misdemeanour, but they are so used for the convenient purpose of compendious reference and to distinguish between the actual perpetrator of the facts, often called the principal offender, and other participators in the misdemeanour who take part by aiding and abetting or counselling or procuring the commission of the offence. Again when considering the sentence to be imposed these are convenient expressions to distinguish between the degrees of actual participation by the various offenders, but for

(1) [1907] 1 K. B. 43. (2) Ibid. 44.
(3) Ibid. 388.

the purposes of conviction in misdemeanours the law is that all are to be regarded as principals whether termed principal offenders, aiders or abettors, or counsellors or procurers.

Bearing this proposition in mind, it follows, in my judgment, that the justices came to a wrong conclusion and should have upheld the appellants' objection. However apt the words in the summons may be to describe the actual part taken by the appellants in the commission of the misdemeanour, the charge against them is to be treated in law as the same in degree as that charged against Gore—namely, that of principal offenders. By s. 8 of the Accessories and Abettors Act, 1861, aiders and abettors in misdemeanours shall be liable to be tried and punished as principal offenders. The words " shall be liable " import that the participators in the misdemeanour are to be regarded as having committed the same offence in law as the principal offender. Sect. 5 of the Summary Jurisdiction Act, 1848, is to the same effect. It is to be observed that this s. 5 does not create an offence as the justices seem to have thought, but merely regulates procedure and punishment.

Once it is established that the appellants aided and abetted, counselled or procured the sale by Gore of the article of food contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875, the appellants are to be treated as principal offenders with Gore. As the respondent Houghton purchased the article of food for test purposes the limitation prescribed is applicable to them as to Gore. It follows that these proceedings are a prosecution under the Sale of Food and Drugs Acts in respect of the sale of an article of food purchased for test purposes and that s. 19 of the Food and Drugs Act, 1899, is, by reason of the proceedings having been instituted after the expiration of twenty-eight days from the time of purchase, a fatal objection to the prosecution.

In my judgment, this appeal must be allowed with costs and the case remitted to the justices to dismiss the summons.

DARLING J. read the following judgment. I agree that the appellants may be charged as principals, and punished as such, but I think it is manifest that they might lawfully be

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charged, tried, and punished as being what they really always were and still remain, accessories before the fact—that is, persons aiding and abetting in the commission of a misdemeanour.

The appellants were charged with being accessories to the offence against s. 6 of the Sale of Food and Drugs Act, 1875, committed by Gore, who had sold the wine bought by him of the appellants. Gore had been guilty of an offence in doing that and I think that the appellants were, properly speaking, accessories; for Blackstone states (Commentaries, vol. iv., p. 35) that: "An accessory is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed." He also writes (p. 36) that "in all crimes under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals: the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, propter odium delicti; in trespass all are principals, because the law, quae de minimis non curat, does not descend to distinguish the different shades of guilt in petty misdemesnors." Even from this, it would appear that there really are accessories in misdemeanours, but that as they cannot be separated from their principals in the matter of punishment, it is not worth while to regard inferior criminals through a microscope, or to classify them scientifically, as felons were treated when most felonies were capital offences so far as the principals were concerned. It is commonly said that there are no accessories in either treason or misdemeanour, but I think that this is a loose and misleading, though often sufficient, statement of the law. I know of no better authority on such a subject as this than Sir Michael Foster's work on Crown Law, and there (3rd ed., p. 344) he writes thus: "Lord Chief Justice Hale spendeth a whole chapter on this point, which he intitleth, 'Concerning principals and *accessaries* in high treason.' And though, in conformity to the established mode of speaking, he calleth every person who can any way be

considered as an accomplice in treason *a principal in it;* yet, when he cometh to speak of the course and order to be observed in the prosecution of the offenders, he considereth those accomplices whose supposed guilt is connected with and dependeth upon the real guilt of another in the light of mere accessaries; and stateth a few cases by way of illustration and proof." And again, at p. 345, Foster states, referring to Lord Hale: "The same rule of equity and natural justice the learned judge in another place applieth to the case of felonious escapes and rescues, and addeth, 'If the principal offender be convicted and hath his clergy, I think the gaoler or rescuer shall never be put to answer the escape or rescue, *as the accessary where the principal hath his clergy is thereby discharged*, for the rescuer and officer are *a kind of accessaries*.' He calleth them *a kind of accessaries*, because there can be no felonious escape or rescue where no felony had been previously committed: but in strict, legal propriety they are not accessaries to the original felony; for though a man should be committed for many felonies, yet the escape or rescue is considered as one single felony and is so charged. With regard to a person knowingly receiving and harbouring a traitor, the learned judge in the place lately cited argueth, That though he is in the eye of the law a principal traitor and shall not be said to be an accessary, *yet thus much he partaketh of an accessary*, his indictment must be special of the receipt and not of the principal treason. If he is indicted by a several indictment, he shall not be tried till the principal be convicted; if in the same indictment with the principal, the jury must be charged to inquire first of the principal offender, and if they find him guilty, then of the receipt; and if the principal be not guilty, then to acquit both; for though in the eye of the law they are both principals in treason, yet in truth he (the receiver) is so far an accessary that he cannot be guilty if the principal be innocent. In the case of Mrs. Lisle, whose hard fate it was to fall into the hands of perhaps the worst judge that ever disgraced Westminster-hall, no regard was paid to this doctrine." One must be careful, even now, to give no cause to be classed with Lord Jeffreys.

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Darling J.

I agree with a learned writer who has stated that accessories in misdemeanours may be "reckoned" as principals for certain purposes (1); but I hold that as a principal does not become an accessory when an accessory is indicted as a principal with him, so an accessory does not cease to be an accessory although he may be charged as a principal.

It seems to me, therefore, that for some purposes of indictment and procedure, the law recognizes accessories as such, in cases of high treason even, and I am of opinion that for similar purposes they are to be recognized in cases of misdemeanour. This opinion appears to me to be confirmed by the very words of the Accessories and Abettors Act, 1861, itself, where in dealing with misdemeanours specifically and alone, in s. 8, these words are used: "Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour . . . . shall be *liable* to be tried, indicted, and punished as a principal offender." That statute was held, in *Du Cros* v. *Lambourne* (2), to be declaratory of the common law, and it appears to me to recognize the distinction in fact and in law between principals and accessories as existing even in cases of misdemeanour, and then to enact—not that accessories are truly principals, but that they "shall be liable" to be treated as though they were. From this, it follows that an accessory may be—and in some cases ought to be—indicted and tried separately as such, be the charge high treason or a mere misdemeanour. Such a course was taken in this case. The appellants were charged with the common law misdemeanour of aiding and abetting Gore in the commission of a statutory offence, i.e., a violation of s. 6 of the Sale of Food and Drugs Act, 1875. In my opinion, this course is in accordance with law. But I think that this particular prosecution is, nevertheless, one "under the Sale of Food and Drugs Acts" within the meaning of s. 19 of the Act of 1899, and that therefore the appellants are entitled to the protection in regard to time limit which is given by that section.

(1) The writer of art. 526 in vol. ix. of Halsbury's Laws of England, p. 248.—Reporter's note.

(2) [1907] 1 K. B. 40.

ACTON J. I agree with my Lord. In this case in the circumstances already stated by my Lord the summons against the appellants for "aiding and abetting, etc.," was made returnable on May 13, 1920, and on that date the appellants appeared to answer the complaint. Objection was then taken on their behalf to the proceedings, and that objection, so far as is material to the present decision, was as follows. It was contended that the prosecution of the appellants (no less than that of Gore) could not be instituted after the expiration of twenty-eight days from March 24, 1920, and accordingly that since it had not been instituted until May 6, 1920, it could not be maintained. The answer to this objection on behalf of the respondent was that the offence charged against the appellants was an offence at common law, for which the appellants were by the provisions of ss. 5 and 11 of the Summary Jurisdiction Act, 1848, liable to be proceeded against at any time within six months from "the time when the matter of such complaint or information . . . . arose," that is to say, at any time within six months from March 24, 1920. It was said, therefore, that, although admittedly the prosecution of Gore, as the person actually selling, could not have been maintained if instituted after the expiration of twenty-eight days from March 24, 1920, the prosecution of the appellants, as aiders and abettors of Gore in the commission of the offence committed by him, could be lawfully and properly instituted at any time within six months of that date.

In my opinion, this contention cannot be supported. A person who aids and abets the commission of any misdemeanour (and this in this context includes an offence punishable on summary conviction) is "liable to be proceeded against in every respect as if he were a principal offender": per Channell J. in *Benford* v. *Sims* (1); see also s. 5 of the Summary Jurisdiction Act, 1848, and compare the Accessories and Abettors Act, 1861, s. 8. He is moreover for all purposes of procedure, conviction, and punishment to be deemed to be in point of law a principal: *Du Cros* v. *Lambourne*, per

(1) [1898] 2 Q. B. 641, 646.

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Acton J.

Lord Alverstone C.J. (1), citing with approval Burn's Justice: "In crimes below the degree of felony there can be no accessories; but all persons guilty therein, if concerned at all, are principals"; see also *Reg.* v. *Burton*. (2) Accordingly, if a person is charged with any crime "below the degree of felony" as a principal offender, and the evidence against him shows that he was absent when the offence was committed, but that he aided or abetted its commission, or caused or procured it to be committed, the person so charged may still be convicted as a principal offender: *Reg.* v. *Clayton* (3), per Williams J., who in summing up said: "In misdemeanours and in treason, all who take part in the crime are principals": *Reg.* v. *Moland* (4), where it appears that a meeting of the judges in Hilary Term, 1843, determined that "In misdemeanours all parties are principals, whether present or not." There is no distinction in point of law for the purposes of prosecution and conviction between him who actually perpetrated the offence "below the degree of felony" and him who, in a case of felony, would be an accessory before the fact.

These appear to be the principles which have to be applied to the present case. Sect. 5 of the Summary Jurisdiction Act, 1848, provides that: "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same" (that is to say, the offence the commission of which is aided, abetted, counselled, or procured), "either together with the principal offender, or before or after his conviction. . . . ."

Beyond question the appellants were liable to be proceeded against as principals, and, as has been shown, are for all purposes of prosecution and conviction to be deemed to be in point of law principals in the doing of the act which is constituted an offence by s. 6 of the Sale of Food and Drugs Act, 1875. The offence in this instance was the sale to the

(1) [1907] 1 K. B. 40, 44.
(2) 13 Cox C. C. 71.
(3) (1843) 1 C. & K. 128.
(4) 2 Moo. C. C. 276, 277.

respondent by Gore of an adulterated article of food purchased from him for test purposes, and s. 19 of the Act of 1899 provides that any prosecution in respect of such sale shall not be instituted after the expiration of twenty-eight days from the time of the purchase. In my opinion, for the reasons already given, the prosecution of the appellants was a prosecution under the Sale of Food and Drugs Acts in respect of the sale by Gore to the respondent, in the commission of which offence the appellants must for the purposes of a prosecution be deemed to be principals not less than Gore. The prosecution was therefore out of time and cannot be maintained. As was pointed out by Mr. Hastings for the appellants, to hold otherwise would be to hold that some separate and distinct offence is created by s. 5 of the Summary Jurisdiction Act, 1848, whereas that is really a section dealing merely with procedure. The contention of the respondent in effect came to this, that whether a defendant in the position of the appellants is or is not entitled to the protection of s. 19 of the Sale of Food and Drugs Act, 1899, may depend upon nothing more than the mere choice of the words employed in describing the offence with which that defendant is charged, though "all persons concerned therein, if guilty at all" (1), must always be in point of law principals. This, in my view, is a contention which cannot be supported.

The appeal must be allowed and the case sent back with an intimation that the opinion expressed by the justices in para. 7 of the special case (for they gave no decision) is erroneous in law.

Appeal allowed. Case remitted.

Solicitors for appellants: *Neve, Beck & Kirby.*

Solicitors for respondent: *Philbrick & Co., for T. W. Weeding, Kingston-upon-Thames.*

(1) Black. Com. iv. 36.

W. L. L. B.

C. A.
1920
Oct. 26, 27.

[IN THE COURT OF APPEAL.]

TUCKWOOD *v.* MAYOR, Etc., OF ROTHERHAM.

[1919. T. 387.]

[SHEFFIELD DISTRICT REGISTRY.]

Public Authorities Protection—Compensation under Workmen's Compensation Act—Public Authority under legal Liability to pay Damages to Workman—Notice by Employer claiming Indemnity—Subsequent Action claiming Indemnity—Limitation of Six Months—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6; *and Rules*, 1913, *r.* 25—*Public Authorities Protection Act*, 1893 (56 *& 57 Vict. c.* 61), *s.* 1 (*a*).

Where a workman in the employment of the plaintiff was injured by an accident caused by the negligence of a servant of the defendant corporation in driving a tramcar on a tramway owned and worked by the corporation, and the workman recovered compensation from the plaintiff, and an action was brought by the plaintiff against the corporation under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, to recover an indemnity in respect thereof:—

Held, that s. 1 (*a*) of the Public Authorities Protection Act, 1893, did not apply, and that therefore the action need not be commenced within six months next after the act, neglect, or default complained of—namely, the act of negligence in driving the tramcar.

Appeal from the judgment of Lord Coleridge J. at the trial of the action without a jury at the Leeds Assizes.

The plaintiff was a carting contractor, and on April 4, 1919, a carter named Wilkinson in the employment of the plaintiff was, in the course of his employment, leading a horse and cart along a road in which a tramway belonging to and worked by the defendants was laid. While Wilkinson was leading the horse and cart a tramcar, driven by one of the defendants' servants, overtook the cart and struck it, and Wilkinson was so seriously injured that his leg had to be amputated. The plaintiff paid Wilkinson 1*l.* 5*s.* a week, being one-half of his weekly earnings, as compensation under the Workmen's Compensation Act, 1906, from the date of the accident. On August 16, 1919, Wilkinson filed a request for arbitration against the plaintiff for settlement of the amount of compensation under the Act, claiming payment of 1*l.* 5*s.* per week. On September 16 the plaintiff filed an answer admitting the claim, and on the

same day he duly served notice on the defendants under s. 6 of the Workmen's Compensation Act, 1906, and rule 25 of the Workmen's Compensation Rules, 1913, stating that Wilkinson had filed a request for arbitration as to the amount of compensation payable by the plaintiff to him, and that the plaintiff claimed to be indemnified by the defendants against his liability to pay compensation on the ground that the injury for which compensation was claimed was caused under circumstances creating a legal liability on their part to pay damages in respect thereof. On October 13 the county court judge made an award for the payment of the sum claimed as from the date of the accident. The defendants did not consent to the judge deciding any question as to their liability to indemnify the plaintiff. On December 10, 1919, the plaintiff brought the present action against the defendants alleging that the accident on April 4 was caused by the negligence of the defendants' servant in driving the tramcar, stating the award of October 13 and that in pursuance thereof the plaintiff had at the commencement of the action paid to Wilkinson the sum of 44*l.* 15*s.* 4*d.* in respect of compensation, and the sum of 5*l.* 14*s.* 8*d.* in respect of the costs of the arbitration, and claiming payment by the defendants of those two sums, and an indemnity under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, against all liability under or by virtue of the award. The defendants in their defence denied negligence and pleaded that "they are protected from these proceedings by virtue of the Public Authorities Protection Act, 1893, s. 1 (*a*), and that the plaintiff's cause of action, if any, is barred." (1)

(1) 56 & 57 Vict. c. 61, s. 1: "Where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

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Lord Coleridge J. came to the conclusion upon the evidence that the defendants were guilty of negligence in the driving of the tramcar, and that it was the cause of the accident. He held that the notice claiming indemnity, which was served on the defendants on September 16, was a "proceeding" within the meaning of s. 1 of the Public Authorities Protection Act, 1893, and having been served within six months after the date of the accident the provision of the Act was complied with. He accordingly gave judgment for the plaintiff for the amount claimed and granted the indemnity.

The defendants appealed.

W. Shakespeare for the defendants. By s. 6 of the Workmen's Compensation Act, 1906, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1.) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2.) If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act." Therefore in default of agreement the county court judge has no power in the arbitration proceedings to determine the right to and amount of the indemnity. By r. 25, sub-rr. 1 and 2, of the Workmen's Compensation Rules the person claiming an indemnity may serve notice on the third party, and by sub-r. 5 nothing in the rule shall empower the county court judge to decide (otherwise than by consent) any question as to the liability of the third party to indemnify

the respondent, or to make any award in favour of the respondent against the third party, or to make any further or other order than that the third party shall not be entitled in any future proceedings between the respondent and such third party to dispute the validity of the award as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent. It is clear that in order to obtain an indemnity against the defendants the plaintiff had to bring an action. The mere service of the notice on them in the arbitration proceedings is not a "proceeding" to recover an indemnity. The action to recover an indemnity comes within s. 1 of the Public Authorities Protection Act, 1893, as an action for "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority"; and the action, not having been commenced within six months next after the act, neglect, or default complained of, as required by s. 1 (*a*), is barred. The act, neglect, or default complained of was in respect of the exercise by the defendants of their tramway powers, namely, in the working of their tramcar on April 4, and they are within the protection of the Act: *Parker* v. *London County Council.* (1) An award of compensation is not necessary before an employer brings an action for an indemnity: *Page* v. *Burtwell* (2); *Thompson & Sons* v. *North Eastern Engineering Co.* (3). Therefore the plaintiff need not have waited until the award was made before bringing this action. The action is based upon the negligent act of the driver of the tramcar on April 4, and the six months' limit applies. The workman "recovered compensation" within the meaning of s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, when his claim was admitted and he was paid compensation by his employer: *Page* v. *Burtwell.* (2) The expression "proceedings" in s. 6, sub-s. 1, of the Act of 1906 is used in a much wider sense than in the Public Authorities Protection Act, 1893: see

(1) [1904] 2 K. B. 501. (2) [1908] 2 K. B. 758.
(3) [1903] 1 K. B. 428, 437.

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Powell v. *Main Colliery Co.* (1); *Page* v. *Burtwell.* (2) In s. 1 (*a*) of the Act of 1893 the word "proceeding" means legal proceedings; therefore the mere service of the notice in the arbitration was not a "proceeding" for an indemnity. While the amount of compensation payable to a workman is determined by an award under the Act of 1906, any question of indemnity against a third person has, by s. 6, sub-s. 2, to be determined, in case of dispute, in an action, which by s. 1 (*a*) of the Act of 1893 must be commenced within six months after the act, neglect, or default complained of, in this case the negligent act in driving the tramcar. [He also contended that the learned judge was wrong in finding that the defendants were guilty of negligence. The Court affirmed the finding upon this question.]

J. W. Jardine for the plaintiff was not called upon.

BANKES L.J. This case raises the question whether the claim is barred by reason of the provisions of the Public Authorities Protection Act, 1893. The facts were these: The plaintiff had in his employ a carter, who on April 4, 1919, was injured owing to a collision between the cart of which he was in charge and a tramcar driven by one of the defendants' servants. The workman claimed compensation from his employer, the plaintiff, who admitted his liability and paid the workman the full compensation to which he was entitled under the Workmen's Compensation Act from the time of the accident. No proceedings of any kind were taken by the workman until August 16, 1919, when he filed a request for arbitration in the county court, and on September 16, 1919, the employer filed his answer and on the same day he served a third party notice under r. 25 of the Workmen's Compensation Rules upon the present defendants. So far as it is material to refer to the provisions of that rule, it is sufficient to say that if a person served with such a notice does not appear he shall be deemed to admit the validity of any award as to any matter which the judge has jurisdiction to decide in the arbitration. The defendants took no action

(1) [1900] A. C. 366, 370. (2) [1908] 2 K. B. 758.

upon the notice, and the county court judge made his award on October 13, 1919, awarding the workman the full amount of compensation—namely, one-half of his average weekly earnings.

The writ in the present action was issued on December 10, 1919, claiming indemnity. By the writ the plaintiff claimed to be indemnified by the defendants under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, in respect of payments made to and to be made to the workman who suffered personal injury by accident arising out of and in the course of his employment under circumstances creating a legal liability upon the defendants to pay damages in respect thereof and to whom the plaintiff has paid compensation and is legally bound to pay further compensation under an award obtained by the workman under the Act. Sect. 6 of the Act of 1906 provides that "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1.) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation." Pausing there, that gives the workman an option to take proceedings against one or both of those persons, but he shall not be entitled to recover from both. If he elects to take proceedings under the Act for compensation it has been decided by this Court in *Fry* v. *Cheltenham Corporation* (1) that the Public Authorities Protection Act, 1893, has no application to such proceedings. In that case, the point having been raised that the claim of a workman against the corporation for compensation was out of time under the Public Authorities Protection Act, 1893, as the proceedings were not commenced until more than six months after the date of the accident, Lord Cozens-Hardy M.R. said: "In my opinion it is perfectly clear that the case is not within the Public Authorities Protection Act, 1893, s. 1. It is impossible to read that section without

(1) (1911) 81 L. J. (K. B.) 41, 42.

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seeing that it deals with something entirely different. There is not a word in that section which is applicable to proceedings under the Workmen's Compensation Act, 1906, which do not in any way depend upon tort."

Sub-s. 2 provides that "If the workman has recovered compensation under this Act"—which is the case here—"the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act." The plaintiff claims in this action the right to the indemnity which is created by that sub-section. It is a statutory right of indemnity which only arises under that sub-section, and in order to establish the right to that indemnity the person claiming it has to establish that the workman has recovered compensation under the Act, that he is the person by whom compensation was paid, and that the person against whom he claims the indemnity was liable to pay damages to the workman. Therefore the plaintiff, in order to establish his right to the statutory indemnity, has to show that the workman had a right of action for damages for negligence against the defendants.

The plaintiff, having commenced this action on December 10, is met by the contention that his claim is barred by the Public Authorities Protection Act, 1893, as the action was not commenced within six months after the date of the accident. It is necessary to consider whether the Public Authorities Protection Act applies to this case at all. Lord Coleridge J. has decided, in the plaintiff's favour, that the action was commenced within the time mentioned in the Act because the third party notice served on September 16 was a "proceeding" within the meaning of the Act. It does not seem to me that that third party notice was a proceeding within the meaning of the Act, and therefore I am not able to rest my judgment upon the same ground as the learned judge rested his; but upon other grounds I think that the conclusion arrived at by the learned judge was right. I arrive at that conclusion,

because in my opinion this particular form of action does not come within the language of the Act of 1893, reading that language in its ordinary sense.

Sect. 1 of the Act provides that "Where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament" —it seems to me to be plain that this action claiming to establish the right to a statutory indemnity is not an action for any act done either in pursuance or execution or intended execution of any Act of Parliament—"or of any public duty or authority"—equally clearly, in my opinion, this action is not within those words—"or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." The question thus is, is this action claiming the right to the statutory indemnity an action in respect of any alleged neglect in the execution of any such duty? In my opinion it is not. It is true that in order to succeed in the action the plaintiff must establish that the workman would have been entitled to recover damages against the corporation for the negligence of their servant in driving the tramcar. That no doubt is an essential part of his cause of action; but I do not think that it is true to say that the action claiming the right to the statutory indemnity is an action in respect of any alleged neglect in the execution of a duty within the meaning of the language used in the section. To accept any other interpretation of the statute would lead to this result, that in a very large number of cases, if not the great majority of cases, a person who sought to take advantage of the indemnity clause in s. 6 of the Workmen's Compensation Act, 1906, would find that he would be out of time, because the proceedings instituted by the workman might very probably not be concluded by the establishment of the workman's right to recover compensation within six months of the date of the accident.

In my judgment the Public Authorities Protection Act does not apply to this particular and very special kind of action, and on that ground the appeal fails.

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SCRUTTON L.J. In this case a workman employed by an employer has been injured by negligence on the part of a servant of the corporation. It has been contended that the learned judge was wrong in deciding that there was negligence on the part of the defendants' servant, but it appears to me that there was abundant evidence on which the judge could so find, and we cannot possibly disturb that finding.

In these circumstances the workman could do one of two things, but not both. He could recover damages against the corporation for the negligence of their servant, or he could recover compensation from his employer under the Workmen's Compensation Act as having suffered injury by an accident arising out of and in the course of his employment. He took the latter course. Sect. 6, sub-s. 2, of the Workmen's Compensation Act provides that, if the employer has to pay compensation to the workman under the Act, he shall be entitled to be indemnified by the person who was guilty of the negligence. The employer accordingly brought this action against the corporation to obtain indemnity, and the point is taken that the action was not commenced within six months after the date of the accident, and therefore the action fails under the Public Authorities Protection Act, 1893. Lord Coleridge J. held that that was a bad objection, and the corporation appeal.

I regard the question as one of considerable difficulty arising from the fact that the Act of 1893 is framed in general terms, and has to be applied to a large number of cases, which were obviously not present to the mind of the Legislature. One has therefore to see whether the general words used apply to this particular proceeding. I have come to the conclusion that the objection is a bad one on three grounds, as to no one of which, taken by itself, am I quite certain that it is sufficient, but the combined effect of all three, looked at in connection with the policy of the Act, makes me quite certain that my decision is right. I have not had the opportunity of hearing Mr. Jardine, who appears for the plaintiff, or he might have convinced me as to the sufficiency of each

of my three grounds, or that there were other grounds which I have not thought of.

In the first place there is the decision of the Court of Appeal in *Fry* v. *Cheltenham Corporation* (1) that to a claim by a workman employed by the corporation against the corporation for compensation under the Workmen's Compensation Act, 1906, the Public Authorities Protection Act, 1893, does not apply. I take the ground of the decision to be that the Act of 1893 deals with claims based on acts or neglects, and that the liability under the Workmen's Compensation Act is not based on acts or neglects, but on the statutory consequences of a contract to employ. It seems to me, and this is my first ground, that, if one starts with the proposition that claims by workmen under the Workmen's Compensation Act are not within the Public Authorities Protection Act, the subsidiary claim against public authorities for indemnity against the workmen's claims must also be outside the Public Authorities Protection Act. If it were necessary to strengthen my view, it has been decided by Bray J. in *Smith's Dock Co.* v. *Readhead & Sons* (2) that the claims on which an employer can recover an indemnity are not limited to claims which can be made by the workman's dependant at common law. In that case the defendants had been guilty of negligence, causing injury to a workman in consequence of which he died shortly afterwards. His illegitimate daughter obtained compensation under the Workmen's Compensation Act from the employer, and indemnity was obtained against the defendants in respect of the compensation so paid to the illegitimate daughter, though the daughter could not have claimed damages against the defendants, because under Lord Campbell's Act such an action could not have been brought on behalf of an illegitimate child. That appears to me to strengthen my view that this action under the Workmen's Compensation Act is outside the provisions of the Public Authorities Protection Act.

Secondly, and in some respects this is very like the first ground, I think, looking at the words of the Public Authorities

(1) 81 L. J. (K. B.) 41. (2) [1912] 2 K. B. 323.

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Protection Act, that the claim against the corporation is not for an act done in execution of an Act of Parliament or of a public duty or authority, or in respect of a neglect in the execution of any such Act, duty, or authority. It is true that negligence is one of the ingredients of the liability to indemnify, but there are several other ingredients of the liability—namely, that the person asking for indemnity has, under the Workmen's Compensation Act, either paid or been compelled by an order to pay the compensation provided by the Act, which may be something quite different from the damages which would follow at common law for an act of negligence. In my view on that ground also, which I gather is the view adopted by my Lord, the case does not come within the words of the Act.

Thirdly, and in this I think that I differ from my Lord, if it is right to say that the six months' period applies and runs from the act of negligence, I think that there was a "proceeding" within the six months. As the Workmen's Compensation Rules at present stand, the statutory proceedings contemplate that the employer may fix the liability of the person guilty of negligence, not in one proceeding by one action, but in two proceedings. The employer may, when the workman claims compensation, make the person guilty of negligence a party to that legal proceeding, and the county court judge may order in that proceeding that he is to be estopped from disputing the amount of the compensation. Liability and amount having to be settled, one part may be settled in one proceeding and the other part in a subsequent action for indemnity. The proceeding in which the corporation were made a party to settle the amount was commenced within six months of the accident. I put this to Mr. Shakespeare: If you first settle the liability and then settle the amount by an arbitration, would he say that the arbitration ought to be commenced within six months? It appeared to me that he did not answer that. In my view it is enough if the first of these proceedings is commenced within six months from the date of the negligence complained of.

I desire to add that Mr. Shakespeare has not argued in this case that r. 25 is ultra vires, and, therefore, I do not express any opinion on that point. I see that it was argued before Phillimore J. in *Nettleingham & Co.* v. *Powell & Co.* (1), and I am not at all clear whether or not Phillimore J. decided it, or whether the Court of Appeal decided it when they affirmed the decision of Phillimore J. (2) I should like to reserve that question until it is raised in some case before us.

Those are the three reasons which lead me to think that the appeal on this point should be dismissed. I should like to say that the reason why I think, on the combined effect of those three grounds, that I am right, although I am not sure on which of them, is the position which would arise in the event of the defendants' contention being right. One knows that the question of the liability of an employer to pay compensation to an injured workman is often taken to the House of Lords, and it appears quite possible to have a double proceeding up to the House of Lords under s. 6, sub-s. 2, of the Workmen's Compensation Act. Take the case of a sub-contractor. There might be a preliminary proceeding to determine whether the principal was liable to pay compensation, and there might be a second proceeding between the principal and the sub-contractor, and it would not be until the sub-contractor had been found liable that he could apply to the person whose servant was guilty of negligence, and claim indemnity from him. The proceedings to determine whether the sub-contractor was liable might easily take more than six months, and, if the defendants' contention were right, the person whose servant was negligent would escape, because the sub-contractor would not be able to claim an indemnity until the decision of the House of Lords was given.

For these reasons, although I think the case is one of considerable difficulty, I have come to the conclusion that the point taken is bad, and that the six months' period provided for by the Public Authorities Protection Act does not apply to this case.

(1) [1913] 1 K. B. 113. (2) [1913] 3 K. B. 209.

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ATKIN L.J. It is said that this action under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, falls within the terms of s. 1 of the Public Authorities Protection Act, 1893. That section runs as follows: "Where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority"—it is not suggested that the action for the indemnity given by s. 6 of the Workmen's Compensation Act is an action for an act done in pursuance of an Act of Parliament—"or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." It has been held that where a municipal authority, acting under statutory powers, works a tramway, if an action is brought against it to recover damages for injuries sustained owing to the negligence of its servants in driving a tramcar, the action is brought in respect of an alleged neglect or default in the execution of an Act, duty, or authority. I propose for the purposes of this argument to accept that proposition as sound, although it has not been argued before us. But the words "in respect of" are very general words which must have some limitation. In the case referred to (1) the cause of action arose directly out of and in consequence of the neglect or default complained of. That is not the position here, because in this case the alleged neglect or default in not driving the tramcar with proper skill gave no cause of action to the plaintiff. He derives his right to make a claim against the defendants, not because of their act or default, but because the Act of 1906 has imposed a liability upon them to indemnify him if he has had to pay compensation to his injured workman by reason of that neglect or default. So that is doubly removed, if I may say so, from the act or default. First, the plaintiff has to rely upon the statutory right to indemnity, and, secondly, he does not acquire that statutory right to indemnity unless the workman has recovered compensation from him. In view of those considerations, and in view of the consequences which would follow from any other

(1) See *Parker* v. *London County Council* [1904] 2 K. B. 501.

construction of the Act, it appears to me that it would be wrong to hold that the Public Authorities Protection Act applied to a case of this kind. I find it difficult to believe that the Legislature can have imposed a limit of six months unless upon the supposition that a cause of action, which is prohibited if it is not brought within the six months, came into existence at the beginning of the six months, that is to say, upon the happening of the neglect or default complained of. If that is the true view, one can understand the Act applying, because then there is a period of six months during which proceedings might be taken against the public authority; but when an action is brought in respect of, in one sense, a neglect or default under circumstances where no cause of action has arisen during the six months, and which, if the defendants' contention were correct, would be barred after the expiration of the six months, it appears to me impossible to suppose that the Act, passed for the protection of the public authority, should be so applied as to defeat any cause of action against the public authority at all.

It is easy to imagine circumstances in which, if the defendants' construction of the Act were correct, the plaintiff would be deprived of any right of action at all. It is clear to my mind that under this indemnity section, s. 6, sub-s. 2, it is a condition precedent that the workman shall have recovered compensation. I am bound by a decision of this Court (1) that within this section the words "recover compensation" or "recover damages" are satisfied if, in fact, the workman asks for and receives compensation or damages, whether or not he has taken legal proceedings in the one case or in the other. I accept that view, but nevertheless it may very well happen, indeed it very often happens, that the employer from the beginning disputes his liability to pay compensation, and the workman is obliged to commence arbitration proceedings to recover compensation and does not obtain an award until after the expiration of six months from the date of the accident. Further, it is, as a general rule, a condition precedent to a right to compensation that a claim is

(1) See *Page* v. *Burtwell* [1908] 2 K. B. 758.

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made within six months from the occurrence of the accident, or in case of death within six months from the time of death. Therefore it may happen that a workman may be so badly injured that he is incapable of making a claim within the six months, and then dies, and his dependants then claim compensation. Although the employer comes under no liability to pay compensation until more than six months after the date of the accident, he will have lost his right to indemnity from the public authority. To my mind that was never contemplated, and affords a very strong reason for refusing to put the construction upon the Act of 1893 contended for by the defendants. In my opinion this action is merely brought to recover the statutory indemnity, and, although proof of neglect or default in the corporation in respect of its tramway undertaking is necessary in order to claim the indemnity, the action is not brought in respect of that neglect or default within the meaning of the Act.

It appears to me to be unnecessary to consider the point upon which the learned judge decided the case. I myself have some little difficulty in accepting his view that the Act was satisfied because, not this action, but some other proceeding was taken within the statutory time. I feel great difficulty in acceding to that, because the Act says that where any action is brought the action shall not lie unless it is commenced within six months, not unless some proceeding essential to the cause of action has been commenced within the six months. However, it is not necessary in my view to determine that matter.

For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *H. F. Cornish, for J. E. Wing, Sheffield.*

Solicitors for defendants: *William Hurd & Son, for Arthur Neal & Co., Sheffield.*

W. F. B.

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Dec. 15.

Emergency Legislation—Landlord and Tenant—Rent less than Two-thirds of rateable Value—Net rateable Value—Appeal from County Court—Point not raised at Trial—Order for Possession—Reasonableness—Breach of Tenancy Agreement—Licensed Premises—Dwelling House—Business Premises—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 1; *s.* 12, *sub-ss.* 2, 7; *s.* 13.

Sect. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed":—

Held, that the expression "rateable value" in this section means net and not gross value.

Per Lush J.: The effect of the sub-section is to take the tenancy to which it applies entirely outside the operation of the Act, although the Act still applies to the house itself.

Held, also, that on an application for possession under clause (*a*), (*b*) or (*c*) of s. 5, sub-s. 1, of the Act no question of alternative accommodation can arise, the only point for the consideration of the Court being whether it is reasonable to make an order or to give judgment for possession.

A public-house which contains dwelling-house accommodation constitutes a "dwelling-house," and falls within the general provisions of the Act; it does not constitute business premises within s. 13. In considering whether an order for possession should be made on the ground that the tenant has been convicted of using the premises "for an immoral or illegal purpose" within s. 5, sub-s. 1 (*b*), of the Act, something more than an isolated instance of illegality must be proved in order to justify the making of an order.

The rule that a point of law cannot be raised on appeal from a county court if it was not raised in the Court below applies only to the appellant. The respondent can support the judgment at the hearing of the appeal upon any legal ground arising on the evidence.

Appeal from the Halifax County Court.

By an agreement under seal dated December 31, 1919, the plaintiffs, Messrs. Waller & Son, Ld., who were brewers carrying on business in Bradford, let to the defendant Martha A. Thomas a licensed public-house known as the "Dusty Miller" inn, at Hove Edge, in the county of York, for the term of three calendar months from December 31, 1919, and thereafter from quarter to quarter, until the tenancy

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should be determined by either party giving to the other three calendar months' previous notice in writing, at the yearly rent of 30*l.* payable monthly. Among the provisions of this agreement were covenants by the defendant: (*a*) to conduct the premises in such orderly manner that the existing licences and certificates should not be taken away or refused to be renewed or the renewal or transfer thereof imperilled; (*b*) to transfer and hand over to the plaintiffs all certificates and licences held by her in respect of the premises on the termination of the tenancy; and (*c*) to purchase from the plaintiffs all the beer, ale, porter and all other malt liquors and all wines, cordials, spirits, cigars, cigarettes and mineral waters sold or consumed on the premises.

On March 10, 1920, the defendant was convicted for having on February 27, 1920, unlawfully sold beer on the premises to two men during prohibited hours, contrary to the orders of the Liquor Control Board, and was fined 10*l.*

On March 27, 1920, the plaintiffs gave the defendant notice to quit and deliver up possession of the premises to them on June 30, 1920. After some correspondence between the parties the defendant wrote to the plaintiffs on June 14, 1920, by her solicitor claiming the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and refusing to transfer the licences.

On June 15, the plaintiffs' solicitor writing in reply to this letter offered the defendant alternative accommodation consisting of (*a*) a dwelling house, or (*b*) an empty cottage, and stated that if the notice to quit was not complied with the plaintiffs would be obliged to bring an action for possession.

On June 18, 1920, the defendant's solicitor wrote in reply to this letter that his client was unable to accept this offer and that she would defend any proceedings which the plaintiffs thought fit to take.

On July 5, 1920, the plaintiffs issued a plaint in the Halifax County Court against the defendant, claiming (1.) possession of the premises on the ground that the tenancy had expired by reason of the notice to quit, and (2.) mesne profits from June 30, 1920, to August 6, 1920. The case was heard in

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the Halifax County Court on August 6, 1920. The defendant pleaded the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Evidence was given on behalf of the plaintiffs that the defendant had been convicted of selling beer during prohibited hours and also that she had bought spirits for sale or consumption on the premises from other persons than the plaintiffs. Evidence was also given by a clerk to the plaintiffs' solicitors that he had inspected the rate book and that the gross value of the premises was there entered as 50*l.*, and the net value as 42*l.* 10*s.* As to the facts the judge found that the public-house was reasonably required by the plaintiffs for business purposes; that no alternative accommodation reasonably equivalent either as regards rent or suitability in other respects was available whether regard were had solely to residential purposes or not. He found that the rateable value of the house for the purposes of the Act was 50*l.*, and as the rent (30*l.* per annum) was less than two-thirds of the rateable value he found that s. 12, sub-s. 7, of the Act of 1920 applied. Upon this he said: "I think the effect of the sub-section is that the provisions of the Act relating to increase of rent and increase of mortgage interest where the landlord is mortgagee do not apply to such a case as this, but that the dwelling house provisions do." He made no order except as to costs, which he gave to the defendant.

The plaintiffs appealed.

A. F. W. Wootten (*F. Wood* with him) for the plaintiffs. The plaintiffs are entitled to recover possession of this public-house. The county court judge was wrong in his construction of s. 12, sub-s. 7, of the Act. His interpretation is that in cases under that sub-section the Act is only excluded as regards increase of rent, and that it still applies as regards recovery of possession. If this were true, the landlord could raise the rent without limit and levy distress for arrears; he would merely be deterred from recovering possession. The true interpretation is that the Act applies to the dwelling house in rem and not

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in personam; therefore it is entirely excluded as regards the particular tenancy. This is clear from s. 12, sub-s. 6, and *King* v. *York*. (1) Thus if the defendant had sublet these premises at 50*l*. a year, so that the rent was not "less than two-thirds of the rateable value," the Act would immediately revive so as to apply to the sub-tenancy, while it still remained inapplicable to the present tenancy by virtue of s. 12, sub-s. 7. The object of s. 12, sub-s. 7, is to prevent injustice being done in abnormal cases through the application of the Act.

Secondly, assuming that this case falls within the Act no question of alternative accommodation arises.

There are here two distinct breaches of the tenant's obligations under the agreement: the conviction for selling beer during closing hours, which necessarily "imperils the licence," and also the purchase of spirits from persons other than the plaintiffs. Upon either of these the plaintiffs are entitled to possession under s. 5, sub-s. 1 (*a*), and the only question is whether the Court considers it "reasonable" to make such an order. As regards the conviction, this is also proof that the defendant was using the premises "for an immoral or illegal purpose" contrary to s. 5, sub-s. 1 (*b*). Finally, the premises here are not "premises used for business trade or professional purposes" within the meaning of s. 13. A public-house partly used as a dwelling house was held to be a "dwelling house" under the Increase of Rent (Restrictions) Acts, prior to 1920: *Epsom Grand Stand Association* v. *Clarke*. (2) It was in consequence of this decision that s. 12, sub-s. 2, proviso (ii.), of the Act of 1920 was introduced, which provides that the application of the Act shall not be excluded by reason only that part of the premises is used for business purposes.

If the question of alternative accommodation is material, which we dispute, then the dwelling house offered by the plaintiffs to the defendant is sufficient to satisfy the requirements of the Act; no business premises need be offered: *Wilcock* v. *Booth*. (3)

(1) [1919] W. N. 59. (2) [1919] W. N. 170. (3) [1920] W. N. 44.

du Parcq for the defendant. The Act of 1920 applies and the tenant is entitled to be protected. "Rateable value" in s. 12, sub-s. 7, means net rateable value, and therefore, as the rent is not less than two-thirds of 42*l.* 10*s.*, the case is not taken out of the Act by that sub-section. It is true that the point was not raised in the Court below, but if the judgment can be supported on any facts appearing in the judge's notes it will not be disturbed: *Chapman* v. *Knight* (1) and (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, and following clauses.

No precise line can be drawn between "dwelling houses" and "business premises" for the purpose of the Act. On either view the judge found that there was no alternative accommodation; and the tenant of a dwelling house which includes business or professional premises is entitled to alternative accommodation which includes business or professional premises. A doctor's house is a case in point.

[McCARDIE J. A dwelling house may come under both s. 12 and s. 13; the test is, what is the dominant purpose and principal user of the premises?]

In order to succeed, the plaintiffs must show a breach of covenant under s. 5, sub-s. 1 (*a*), and the question of alternative accommodation is then material in deciding whether it is reasonable to make an order for possession under the section. The county court judge held that it would be unreasonable to make such an order. It cannot be supposed that he did not, in arriving at this conclusion, take into consideration the alleged breaches of covenant.

Wootten in reply. It is not open to the defendant to argue here that the ratcable value of the premises is 42*l.* 10*s.* and not 50*l.*, as found by the county court judge, and that the case does not come within s. 12, sub-s. 7. The point was not raised in the Court below and it cannot be entertained here. Apart from this, the defendant acquiesced in the view that the rateable value was the gross annual value—50*l.* per annum—and by virtue of her assent she is now debarred from presenting the contrary view.

(1) (1880) 5 C. P. D. 308.

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LUSH J. This case raises questions which are interesting and also difficult. The action is brought by the owners of a licensed house for possession, and the tenant pleads in her defence the provisions of the Increase of Rent and Mortgage (Restrictions) Act, 1920, upon which complicated questions often arise. The landlords, that is to say, the plaintiffs, gave to the tenant proper notice to quit and were entitled to possession, unless the defendant could bring herself within the Act. The first question arises under s. 12, sub-s. 7, of the Act, which says: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." It was argued on behalf of the plaintiffs that the rent, which is 30*l.* per annum, is less than two-thirds of the rateable value and that therefore the Act does not apply to the tenancy in question; and that the house itself is outside the provisions of the Act.

In the county court evidence was given of the entries in the rate book from which it appeared that the gross value of the house was 50*l.* and the net annual value 42*l.* 10*s.* I gather that counsel for the plaintiff at the trial made no suggestion as to the meaning of the words "rateable value" in the section. This evidence would be of no assistance to the plaintiffs, unless the words of the section refer to "gross" value: for the net value of this house is only 42*l.* 10*s.*, and the rent which is 30*l.* per annum is not "less than two-thirds of that amount." If however the section refers to gross value, then the premises are within the exception created by s. 12, sub-s. 7, the rent being less than two-thirds of 50*l.* Now the solicitor who represented the defendant at the trial did not contend that the words of the section should be construed as referring to net value, and the point was apparently left to the county court judge without argument. There was moreover no

evidence before the judge that the house was differently assessed in 1914, which was the really important year. The only evidence on the matter came from the rate book, and the entry of 50*l.* per annum in that book must have related to the gross value, so that I have no doubt that the county court judge treated "rateable value" in the section as referring to the gross and not to the net value.

The question is whether that view is correct. I have come to the conclusion that it is not, and that the words "rateable value" refer to net value. It seems to me almost impossible to suppose that the Legislature used those words, which occur so frequently in the Act, to mean the gross value. For purposes of comparison, if the rent be one factor to be considered, it seems to me certain that the other factor would be the net value. One cannot imagine a useful comparison being made between the rent and the gross value. A further fact which confirms this view is that the ordinary person is only acquainted with the net and not with the gross value. It is the figure which appears on the demand notes served on people for the purpose of collecting rates and taxes. This then is the interpretation which the words "rateable value" ordinarily bear and it is the meaning naturally given to them having regard to the opportunity which the average person possesses of knowing what the sum is. The difficulty is that the point was not taken by the defendant in the county court, and therefore it is said by the appellant to-day that it is not open to him to raise it here as respondent on the appeal. But such a proposition, thus broadly stated, is unsound. It is true that an appellant from the county court cannot ask this Court to give effect to a point of law which he himself has not raised in the Court below; it is a condition precedent that he should have taken the point before the county court judge. No such rule, however, applies to a respondent, and if it can be shown by him that the judgment can be supported on some good legal ground appearing upon the evidence, then he can submit his point to support the judgment, although he did not present it in the Court below. This

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difference exists between the appellant and the respondent, because, if the judge decides in favour of the respondent, there is no need to call the judge's attention to other possible points; it is enough for him to rely on the judge's view of the law. It would be surprising if the respondent could not say: "The judgment in my favour was right, and as I succeeded on another ground I did not ask the judge to decide this further point." This is a good contention and one which the respondent is entitled to raise. But it is said that the respondent's solicitor in the county court acquiesced in the contention of the plaintiff and that if the plaintiff's counsel presented a view of the law to the county court judge, to which the defendant assented, in the sense that he did not oppose it, the latter cannot afterwards turn round and say: "Although I assented to that contention in the Court below, I am entitled now to point out what is the true view of the law." I do not know what is meant in this connection by "assenting to" or "acquiescing in" a contention. The respondent was not obliged to put his argument before the county court judge and his silence or assent cannot affect his right to rely in this Court upon a point of law if it is sound. If the respondent actually invited his opponent in the county court to present a certain contention of law to the county court judge it might not be fair to allow him afterwards to avail himself of the opposite contention. There may be cases in which counsel for the defendant may say: "My view of the law is this, you need not argue the point." It may be that if he does so, he could not afterwards contend the opposite upon an appeal. But that is not the case here, and I see nothing to prevent the respondent from saying that the judge was mistaken in his view of the meaning of the words "rateable value." Correcting that mistake and taking rateable value to mean net value this house does not come within the words "where the rent is less than two-thirds of the rateable value." Therefore the Act does not apply to this tenancy.

The judge's view is that the sub-section applies and that the effect of it is to except the present case from the

provisions of the Act as to increase of rent and mortgage interest, but to leave the provisions as regards dwelling houses still applicable. In my opinion what the section means is this: If the rent were less than two-thirds of the rateable value, the Act would not apply so as to protect the tenancy at all; but the last words mean, as was here contended, that the Act would still apply to the house, and therefore if it were sublet at a rent exceeding two-thirds of the rateable value, so that the sub-tenancy was outside the exception, the provisions of the Act would apply to that sub-tenancy.

The main question is whether the landlords are entitled to possession and whether the judge is right as to the ground for refusing to make an order for possession.

The agreement contains a negative covenant by the tenant to conduct the premises so that the renewal of the licences may not be imperilled; and an affirmative covenant to purchase beer, wines and spirits from the landlords alone. This is a fully tied house and there was evidence before the county court judge of breaches of those provisions. That being so, the judge would have power to make an order for possession by virtue of s. 5, sub-s. 1 (*a*); but he would have to decide whether under all the circumstances it was "reasonable" to make such an order. It is said that the judge has wrongly dealt with the case, in that he has applied the provisions of s. 5, sub-s. 1 (*d*), to a case under sub-s. (*a*), and that he refused to make the order on the ground that "reasonably equivalent" alternative accommodation was not available, when the only question for his consideration, if breaches of covenant by the tenant had been proved, was whether it was "reasonable" to make an order for possession. The plaintiffs did not ask for possession on the ground that they reasonably required it for their own accommodation, but on the ground that their licence was imperilled; and if they are right the county court judge must have misdirected himself as to the true question at issue. He does not decide whether it is reasonable to make such an order. He decides a fact relevant to a different ground for relief, but irrelevant to the ground on which relief was asked.

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In conclusion I wish to deal with one other point raised by Mr. Wootten in his able argument for the appellants. He says that because the respondent was convicted of selling beer within prohibited hours, s. 5, sub-s. 1 (*b*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies in that she used the premises for an "illegal purpose." There was only one case of sale within prohibited hours, and I do not think that an isolated breach would be sufficient to justify the learned judge in holding that the house was used for an illegal purpose. Those words refer to putting a house to an improper use to carry out an unlawful purpose. The case must go back for a new trial with the usual result as to costs.

McCARDIE J. The able arguments of learned counsel in this case have helped us to appreciate fully the complexity of the legislation involved in the Increase of Rent, &c. (Restrictions), Act, 1920. The appellants, who are brewers, had in December, 1919, let to the respondent a public-house known as the "Dusty Miller" inn, Halifax, of which the rent was 30*l.* per annum. On March 27, 1920, they gave her three months' notice to quit expiring June 30, 1920, in accordance with the agreement. The respondent refused to give up possession and the landlords took proceedings in the county court. At the hearing, the plaintiffs proved that the gross estimated rental of the premises was 50*l.*, and the net annual value 42*l.* 10*s.* On that evidence the judge took the view that 50*l.* was the rateable value for the purpose of the Increase of Rent, &c. (Restrictions), Act, 1920. It was submitted by the plaintiffs that as the rent was less than two-thirds of the rateable value the case came within the exception created by s. 12, sub-s. 7, of the Act, and that the Act did not apply to this case. If rateable value means gross estimated rental that contention is correct, but if it means net annual value the contention is wrong, having regard to the figures which I have mentioned. I have no doubt that "rateable value" means net annual value of the premises. It is impossible for any one cognisant of rating matters to take the gross estimated rental as the rateable value: for it is clear from

the Rating Acts that it is the net annual value on which rates are paid by the tenants.

The Parochial Assessments Act, 1836, s. 1, provides: "No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutations rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent. . . . ." This definition was supplemented by the definition of "gross estimated rental" in s. 15 of the Union Assessment Committee Act, 1862, which is "the rent at which the hereditaments might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and the commutation rent-charge, if any."

It is therefore impossible to take the "gross estimated rental" as the "rateable value." The question is really concluded if one looks at the Schedule to the Parochial Assessments Act, 1836. The form of rate there set out contains as separate headings—"Description of Property Rated," "Gross Estimated Rental," "Rateable Value"; and the term "rateable value" is there used as equivalent to "net annual value." Therefore, when an Act of Parliament speaks of "rateable value" it means "net annual value," i.e., the sum on which the tenant pays rates; and as the rent here is not "less than two-thirds" of that, the house, according to the figures given by the landlords, falls within the scope of the Act of 1920. But the point arises whether the respondent can take the point that 42*l.* 10*s.* was the figure to contrast with the 30*l.* rent, when he did not take it in the Court below. The rule was established by the House of Lords in *Smith* v. *Baker & Sons* (1) that a point of law cannot be raised here on appeal from the county court if not raised

(1) [1891] A. C. 325.

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in the Court below. When a point of law appears on undisputed evidence or on documents in the Court below on which no further evidence can be given I cannot see why it cannot be raised here if it arises on those facts and documents, but the rule of law is otherwise. This rule—highly technical to my mind—does not, however, apply to a respondent; if he has one good point and the county court judge is in his favour on that, he need not raise all his other possible points in the county court. That might involve the successful party in an expensive prolongation of the proceedings. Therefore I think that a respondent can upon appeal raise points of law arising out of the evidence of the other side or upon admissions or undisputed documents put in evidence in the case: *Chapman* v. *Knight*. (1) But even if the Act applies to this case the appellants still say they are entitled to possession, because it falls within s. 5, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, which provides that an order for recovery of possession may be made if (*a*) any "obligation of the tenancy . . . . has been broken or not performed," or (*b*) if the tenant has allowed "the premises to be used for an immoral or illegal purpose. . . . ." Now having read the terms of the tenancy and particularly those clauses put to us by Mr. Wootten I think that there was evidence on which the county court judge could be called upon to consider whether these obligations had been broken.

The defendant admitted that she had been convicted and that this might create a breach of her covenant to carry on the business in such a manner as not to imperil the licence. Although I say that, I do not think that the judge should overlook the decisions upon covenants of this kind which are incidentally set out in Paterson on the Licensing Acts, 30th ed., pp. 146 et seq. I think there was evidence which would justify him in considering whether or not a breach had been committed. As to Mr. Wootten's suggestion that the defendant came within s. 5, sub-s. 1 (*b*), by allowing the premises to be used for an "illegal purpose," I agree with

(1) 5 C. P. D. 308.

Lush J. that the object of this clause (s. 5, sub-s. 1 (*b*)) is to deal with cases in which the improper user of the premises is in furtherance of an unlawful purpose, and not with an isolated instance of illegality in carrying out a lawful purpose. Here the tenant was carrying out the lawful business of a licensed victualler; incidentally she committed a breach, perhaps a technical breach, of the licensing regulations. In my opinion this does not amount to "user for an illegal purpose." If a breach of covenant by the tenant was established the county court judge could then consider whether, in spite of the breach, it would still be unreasonable to make an order for possession. The county court judge did not take this into consideration, but only whether there was suitable "alternative accommodation." The question of alternative accommodation does not arise under s. 5, sub-ss. 1 (*a*) (*b*) (*c*), of the Act, but only under sub-s. 1 (*d*), and I think that there must be a new trial. Another important point which arises is whether this public-house is a "dwelling house" within the general provisions of the Act or constitutes "business premises" within s. 13. If the latter is the true view, then an order for possession will only be made if it is proved that the premises are reasonably required by the landlord for business, trade or professional purposes or for the public service, and the Court is satisfied that alternative accommodation reasonably equivalent as regards rent and suitability in all respects is available. Upon the whole I think that a public-house falls within the general provisions of the Act and not within the specific provision of s. 13. Under the Increase of Rent (Restrictions) Acts prior to 1920 the Court of Appeal had to consider this very point in *Epsom Grand Stand Association* v. *Clarke* (1) and there held in the clearest terms that a public-house was a "dwelling house" for the purpose of those Acts.

Bankes L.J. is reported to have said in that case (2) that "the defendant and his family and servants continually lived on the premises and their residence was in

(1) [1919] W. N. 170; 35 Times L. R. 525.

(2) 35 Times L. R. 526.

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accordance with the terms of the agreement. Was this a dwelling house? The house was dwelt in, and it was let to the defendant for that purpose. In the fullest sense it was a dwelling house, and none the less so because it was also a public-house. He could not accept Mr. Disturnal's contention that because it was let for business purposes it could not be a dwelling house within the Act. If that contention were accepted it would exclude a great many premises which the Legislature did not intend to be excluded."

That is a definite decision of the Court of Appeal, but I confess to feeling that juristic criticism may be properly applied to it: I feel with the deepest respect that the true test is to ascertain the dominant purpose and principal user of the premises. One might well have thought that the dominant purpose and object of a public-house was to carry on the business of a licensed victualler and that the provision of accommodation for the occupants was a mere adjunct of the business. One might have said that premises do not cease to be "business premises" because dwelling accommodation necessary for the purpose of the business is attached. However the Court of Appeal have taken a different view and we must loyally follow it. In my opinion Mr. Wootten is right in saying that the Act of 1920 recognizes the Epsom decision and treats it as an integral part of the scheme of the Act: for s. 12, sub-s. 2 (ii.), provides that the application of the Act shall not be excluded "by reason only that part of the premises is used as a shop or office or for business trade or professional purposes." Reading the Epsom decision in conjunction with those words I cannot avoid the conclusion that this house must be treated as a dwelling house within the general provisions of the Act rather than as business premises under s. 13 with the special modifications therein provided. The appeal must be allowed and there must be a new trial, subject to the opinions which we have expressed as to the proper interpretation of the Act.

LUSH J. I desire to add that I entirely agree with the view which has just been expressed, that a public-house or

hotel falls within s. 12, sub-s. 2, rather than within s. 13 of the Act. I omitted to deal with the point in my judgment and think it desirable to express my concurrence.

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Appeal allowed.

Solicitors for plaintiff: *Godden, Holme & Ward, for H. M. Dawson, Bradford.*

Solicitors for defendant: *Gibson & Weldon, for H. Bastide & Son, Halifax.*

F. P. F.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A. 1919 *Nov.* 8.

THE KING *v.* HUNTER.

Criminal Law—Habitual Criminal—Conviction of substantive Offence—Postponement of Trial of being habitual Criminal—Trial of Question by different Jury—Jurisdiction—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 1—*Indictments Act*, 1915 (5 *& 6 Geo.* 5, *c.* 90), *s.* 5, *sub-ss.* 3, 4.

There is no power to try the allegation that an accused person is a habitual criminal before any jury other than the jury which convicted him of the substantive offence charged in the indictment.

APPEAL against conviction.

The appellant, Charles Hunter, was indicted at the London sessions for office-breaking and larceny, and also for being a habitual criminal. The jury convicted him on the substantive charge. Before the charge of being a habitual criminal, which the appellant denied, was gone into, he stated that he desired to call a witness, not present, to prove that he had been in honest employment. After discussion, the deputy-chairman adjourned the trial of this charge to the following sessions, sentencing the appellant in the meanwhile to three years' penal servitude on the substantive charge. At the following sessions the appellant was tried before another jury and they found that he was a habitual criminal, and he was thereupon further sentenced to five years' preventive detention.

He appealed against that conviction.

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Roland Oliver for the appellant. There was no power to try this charge before a jury other than the jury which had convicted him on the substantive charge. By s. 10, sub-s. 1, of the Prevention of Crime Act, 1908: "Where a person is convicted on indictment of a crime . . . . and subsequently the offender . . . . is found by the jury to be a habitual criminal," he can be sentenced to preventive detention. The words "the jury," not "a jury," indicate that the jury that convicted of the "crime" is meant. And the provision in sub-s. 4 "the jury shall . . . . be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again" points the same way. Moreover s. 17, sub-s. 3, which deals with the trial of this charge in Scotland, says in terms that it shall be tried by "the same jury." The matter is really covered by authority: see *Rex* v. *Jennings* (1), where it was held that this charge must be tried immediately after the primary charge.

The law has not been altered by s. 5, sub-ss. 3 and 4, of the Indictments Act, 1915. (2) The trial purported to be postponed under sub-s. 4 as being expedient in consequence of the power the Court had exercised under sub-s. 3 "for any other reason" of ordering a separate trial. But sub-s. 3 deals only with offences and with counts, and the charge of being a habitual criminal is not an offence, nor is its statement in the indictment a count. It is only an allegation of a status or condition in the accused which, if established, enables the Court to deal with him in a special manner by passing a further sentence of preventive

(1) (1910) 4 Cr. App. R. 120.

(2) Indictments Act, 1915, s. 5, sub-s. 3: "Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable . . . . the court may order a separate trial of any count or counts of such indictment."

Sub-s. 4: "Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act . . . . to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary."

detention. A parallel instance is the charge in an indictment of a previous conviction, which is not the charge of an offence, but the allegation of a fact: see r. 11 of the Rules in Sch. I. to the Indictments Act, 1915.

The contrast between the words in s. 10, sub-s. 1, of the Prevention of Crime Act, 1908, "Where a person is *convicted* on indictment of a crime," and those in sub-s. 2, "A person shall not be *found* to be a habitual criminal," and those in sub-s. 3, "In any indictment . . . . it shall be sufficient, after charging the crime, to *state* that the offender is a habitual criminal," is significant. Sub-s. 3 has, it is true, been repealed by s. 9, sub-s. 1, and Sch. II. to the Indictments Act, 1915, but is substantially reproduced in r. 11 of the Rules in Sch. I. The case of *Rex* v. *Harding and Others* (1) may seem against this contention, for there the trial judge had, after their conviction of the substantive offence, refused to proceed with the allegations that the appellants were habitual criminals, and Darling J. said: "The allegations of being habitual criminals remain on the file, and these men can still be tried on them."

[DARLING J. But I did not say they could be tried by a different jury.]

Sir R. D. Muir and *Arthur Bryan* for the Crown. The difficulty has arisen through the anxiety of the draftsman of the Prevention of Crime Act, 1908, to make it clear that a different jury might try the charge, so as to avoid the objection that it was unfair that the same jury which had just convicted him should try it. It is admitted that *Rex* v. *Jennings* (2) correctly states the law as it then stood; but that has been altered by s. 5, sub-ss. 3 and 4, of the Indictments Act, 1915. To be a habitual criminal must be an offence, and the statement of it a count.

[DARLING J. Then it ought to be numbered: see r. 4 (6.) of the Rules in Sch. I. to the Indictments Act.]

That is merely directory.

[THE EARL OF READING C.J. And it should refer to the section of the statute creating the offence: see r. 4 (3.).]

(1) (1920) 15 Cr. App. R. 33. (2) 4 Cr. App. R. 120.

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It is admitted that it should have referred to that. It is odd, if this is not an offence, that a person sentenced to preventive detention on this charge is by s. 10, sub-s. 1, of the Prevention of Crime Act, 1908, to "be deemed . . . . to be a person convicted of felony." In *Rex* v. *Turner* (1) it was held that the jury trying this charge can be sworn as for a felony or misdemeanour. Very great difficulties will arise if there is no power to postpone trials of this issue. A jury may disagree or a juryman may fall ill. And again, if the whole case is to be tried over again, the second jury may acquit on the substantive charge.

[*Rex* v. *Penfold* (2) was also referred to.]

The judgment of the Court (The Earl of Reading C.J., Darling and Salter JJ.) was delivered by

THE EARL OF READING C.J. The appellant was convicted by a jury of office-breaking and larceny, and in addition another jury found that he was a habitual criminal, and he was sentenced to three years' penal servitude in respect of the substantive offence and to five years' preventive detention in respect of the finding that he was a habitual criminal. The difficulty that has arisen in the case is that after the appellant had been convicted of the substantive offence, and before the charge that he was a habitual criminal had been dealt with, he stated that he wanted to call a witness to prove that he had been in honest employment and had not, therefore, been leading persistently a dishonest or criminal life. But that witness was not present, and the learned deputy-chairman, after considerable discussion and having the point now raised clearly before his mind, adjourned the hearing until the next sessions, passing in the meanwhile the above sentence of penal servitude. At the following sessions another jury found that the appellant was a habitual criminal, and he was then sentenced to five years' preventive detention. Against that conviction he now appeals. On this appeal it is said that the proceedings on the adjournment ought to be declared null and void, and

(1) [1910] 1 K. B. 346.

(2) [1902] 1 K. B. 547, 550.

the sentence of preventive detention quashed, on the ground that there was no power to adjourn the trial, the contention being that on its proper interpretation, s. 10 of the Prevention of Crime Act, 1908, enacts that where, in addition to the substantive charge, a charge is made that the prisoner is a habitual criminal, that charge must be tried by the same jury that convicted him on the substantive charge. Mr. Roland Oliver for the appellant, who argued the case with his usual ability and lucidity, frankly stated that there were no merits, especially as the adjournment was in the appellant's interest, and said that a technical point of law only was raised. But a decision on a point of law, even where there are no merits, is to be followed in other cases, and we must consider it as a point of law.

Sect. 10 of the Prevention of Crime Act, 1908, gave power to a judge to pass a sentence of preventive detention in addition to one of penal servitude. By sub-s. 4, the prisoner is first arraigned on the principal charge, and, after conviction, the jury shall, unless he pleads guilty, "be charged to inquire whether he is a habitual criminal." In my judgment the whole question depends upon whether the charge against the appellant was a charge of an offence or crime or whether it merely asserted a status or condition in him which would enable the Court if it were established to deal with him in a certain manner. We are of opinion that Mr. Oliver's argument on his behalf is sound, and that there is nothing in the Act which would justify us in saying that the charge of being a habitual criminal is a charge of a crime or offence. Of course, if it is, then the statement of it is a count in the indictment. If, on the other hand, it is not, its statement in the indictment is only a notice of the intention of the prosecution to establish, if it can, the status of habitual criminal. Now there is authority for the view that the charge of being a habitual criminal can only be tried by the same jury as convicted the accused of the substantive charge—namely, *Rex* v. *Jennings*. (1) In that case Phillimore J. said during the argument (2): "As the

(1) 4 Cr. App. R. 120. (2) 4 Cr. App. R. 120, 121.

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law is at present, when a prisoner is found guilty of the first charge, the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment." And Darling J., who delivered the judgment of the Court, said (1): "The only way the Recorder could have acceded to that application [made by the prisoner for the postponement of the trial of the charge of being a habitual criminal], seeing that the charge of being a habitual criminal is part of the indictment on the primary charge, would be, before verdict, to discharge the jury from returning a verdict, and at the ensuing sessions to try the case over again." That is a decision of this Court that the trial cannot be adjourned. It is not necessary, in view of that decision, to consider elaborately the provisions of the Act of 1908, but it is worthy of observation that s. 17, which is in a general part of the Act applying its provisions and policy to Scotland by sub-s. 3, enacts clearly that it must be the same jury to try the prisoner as a habitual criminal which has just convicted him of the substantive offence. Although it is quite true that that sub-section does not apply to England, yet the fact has some bearing on the interpretation of the English sections where there is an ambiguity, if any there be, that the Act prescribing a common policy for England and Scotland should contain a provision free from ambiguity in the part relating to Scotland dealing with the same subject-matter as does the English section.

If one turns to s. 10, the object of the Legislature is shown by reference to sub-s. 1—namely, to enable the Court to pass a further sentence if the accused is found to be a habitual criminal. That seems to me to be the key to the question, and to show that the Act intended to empower the Court, not to convict of another offence, but to pass a further sentence. That shows that Parliament was not creating a new offence; therefore the only question remaining is whether Parliament has altered the law since the decision in *Rex* v. *Jennings*. (2) It is suggested that it has done so

(1) 4 Cr. App. R. 120, 122. (2) 4 Cr. App. R. 120.

in the Indictments Act, 1915, by s. 5, sub-ss. 3 and 4. Now the difficulty in the way of that contention is that those sub-sections deal only with the amendment of counts and the separate trial of and the postponement of the trial of counts, and from beginning to end s. 5 relates to the trial of offences. An indictment is a particular form of charge of having committed a crime, and a count is part of an indictment which states particulars of the crime charged in the indictment. There may be a series of counts but each charges an offence, and whenever in the Act a reference is found to an indictment or count it must be assumed that Parliament is dealing with a crime or offence. Some distinction was drawn between a crime and an offence in *Rex* v. *Penfold* (1), but I do not propose to deal with it, as it does not affect the present case. Rule 11 of the Rules in Sch. I. to the Indictments Act, 1915, so far from assisting the case for the Crown, appears to us to be against it. A distinction seems to be there implied between a count which charges an offence and a charge of a previous conviction or of being a habitual criminal, and it is provided that the latter charges shall be stated at the end of the indictment. That seems to show that the charge of being a habitual criminal is not a substantive offence. It necessarily follows, as pointed out in *Rex* v. *Jennings* (2), that there cannot be a trial by separate juries.

The result is, unfortunate as it may be in this particular case, that the appeal must be allowed, and the sentence of preventive detention quashed.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Crimina Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) [1902] 1 K. B. 547, 550. (2) 4 Cr. App. R. 120.

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C. C. A.
1920
Nov. 8, 9, 10.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* BRADBURY.

THE KING *v.* EDLIN.

Criminal Law—Offence punishable on summary Conviction—Penalty exceeding Three Months' Imprisonment—Consequent Right to elect Trial by Jury—Right of Prosecution to indict—"Punishable only on summary conviction"—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 94—*Perjury Act*, 1911 (1 *& 2 Geo.* 5, *c.* 6), *s.* 5 (*b*), *s.* 16, *sub-s.* 3.

The appellants were convicted on indictment under s. 5 (*b*) of the Perjury Act, 1911, of knowingly and wilfully making statements false in material particulars in returns of income tax. By the proviso to s. 16, sub-s. 3, of the Act where the making a false statement is by any Act passed before the commencement of the Perjury Act made punishable only on summary conviction, it shall remain so punishable. By s. 94 of the Finance (1909–10) Act, 1910, such offence is made punishable on summary conviction and subject to imprisonment not exceeding six months:—

Held, that as the penalty under s. 94 exceeded three months' imprisonment an offender, under the provisions of s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, might elect to be tried on indictment, and that consequently the offence was not punishable "only" on summary conviction, and that the conviction of the appellants was valid.

APPEALS against convictions and sentences.

The appellants, Alan Henry Bradbury and Charles Ernest Edlin, were convicted on separate indictments before Bray J. at the Hampshire Assizes, under s. 5 (*b*) of the Perjury Act, 1911, of knowingly and wilfully making statements false in material particulars in their income tax returns, and each was sentenced to two years' imprisonment without hard labour.

Sir R. D. Muir and *Harold Murphy* for the appellant Bradbury. There was no jurisdiction to try the appellant on indictment. He was convicted under s. 5 (*b*) of the Perjury Act, 1911 (1), and if that stood alone no question would arise. But s. 16, sub-s. 3 (1), by the proviso makes

(1) Perjury Act, 1911, s. 5: "If any person knowingly and wilfully makes . . . . a statement false in a material particular, and the statement is made . . . . (*b*) in a . . . . return, or other document which he is

punishable only on summary conviction any offence which was "punishable only" on summary conviction under any Act passed before the Perjury Act. This offence was created by s. 94 of the Finance (1909–10) Act, 1910 (1), which was of course passed before the Perjury Act, and that section makes the offence punishable on summary conviction. That section has been substantially reproduced by s. 227 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), but is not repealed. The offence was, therefore, "punishable only" on summary conviction within the proviso to s. 16, sub-s. 3, of the Perjury Act. (2) But it is said that this offence is not "punishable only" on summary conviction because by s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879 (3), a person accused thereof can elect to be tried by a jury, inasmuch as the penalty exceeds three months' imprisonment, and that, consequently, the offence is punishable also on indictment. But to say that an offence is punishable on indictment must mean punishable on indictment at the option of the Crown, which this was not

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authorised or required to make . . . . by any public general Act of Parliament . . . . he shall be guilty of a misdemeanour and shall be liable on conviction thereof on indictment to imprisonment . . . . for any term not exceeding two years. . . . ."

Sect. 16, sub-s. 3: "Where the making of a false statement is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act: Provided that where such an offence is by any Act passed before the commencement of this Act, as originally enacted, made punishable only on summary conviction, it shall remain only so punishable."

(1) Finance (1909–10) Act, 1910, s. 94: "If any person for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty under this Act . . . . in any return made with reference to any duty under this Act, knowingly makes any false statement . . . . he shall be liable on summary conviction to imprisonment for a term not exceeding six months with hard labour."

(2) See note (1) ante, p. 562.

(3) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17, sub-s. 1: "A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may . . . . claim to be tried by a jury, and thereupon . . . . the offence shall as respects the person so charged be deemed to be an indictable offence. . . . ."

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under s. 94 of the Act of 1910; it only became so punishable in an event which did not happen in this case—namely, the election of the appellant. The proviso means "primarily punishable." The Perjury Act was not intended to alter the punishment of the offence, yet the suggested interpretation of it alters the punishment from the six months' imprisonment imposed by the Act creating the offence to one of two years' imprisonment. The proviso must be given some operation, and the offence under s. 94 is the only one upon which it can operate, for no other section dealing with the offence of making a false statement has been found where the punishment is for three months or less. This is a penal statute and must be construed strictly.

Sir Ellis Griffith K.C. and *Harold Murphy* for the appellant Edlin adopted the above argument.

Travers Humphreys and *T. H. Parr* (*Inskip K.C.* with them) for the Crown. The words in the proviso "punishable only on summary conviction" ought to be read "punishable only on summary conviction and not on indictment." It is said that no meaning can be given to the proviso unless it be referred to s. 94 of the Act of 1910. The answer to that is that this proviso—a saving clause—is also found in the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), in s. 19, sub-s. 2, and in the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), in s. 47, sub-s. 2, both, as is the Perjury Act, being consolidating Acts. The object in each case was, not to make triable on indictment offences which otherwise would not be so triable, but was this: The words of sub-s. 3 of s. 16 are very wide and the draftsman added the proviso to guard against the contingency of there being sections under other Acts—e.g., s. 25 of the Customs and Inland Revenue Act, 1869 (32 & 33 Vict. c. 14)—imposing penalties for trivial offences, which he had overlooked, so that in the absence of the proviso the offender might be exposed to indictment.

When the appellants were indicted all the consequences of indictment followed, including the sentence as for a common law misdemeanour or under the statute, and the fact that

s. 94 of the Act of 1910 fixed the punishment at a maximum of six months' imprisonment is immaterial.

[*Reg.* v. *Brown* (1) was referred to.]

Sir R. D. Muir replied.

The judgment of the Court (The Earl of Reading C.J., Darling and Salter JJ.) was delivered by

THE EARL OF READING C.J. The appellants were convicted separately on every count of an indictment which charged in the first count a conspiracy to defraud the Revenue in respect of income tax, super tax and excess profits duty, by false statements, false accounts and false returns. They were then charged and convicted on counts two, four, six and eight of making false statements in their returns contrary to s. 5 (*b*) of the Perjury Act, 1911. There was a further count, number ten, containing the same charge relating to excess profits duty, and a further series of counts, making fourteen altogether, charging both appellants with the offence at common law of defrauding the Revenue. The jury answered specific questions put to them by the learned judge and, as I have said, convicted on all the counts.

The appeal has been based on two main grounds. It was said, first, that counts two, four, six and eight were bad in law, and then that the other counts, except number ten, were also bad in law, inasmuch as no such offence as therein charged is known to the law. That part of the case has not been argued, and we say nothing about it. If the appellants were rightly convicted on the conspiracy count, and further, on the perjury counts, it would be idle to discuss other points which would be merely academic.

With regard to the conviction on the conspiracy count, the allegation was that it was against the weight of evidence, and that there had been misdirection by the learned judge. [His Lordship discussed the evidence and the summing up and said the Court came to the conclusion that the verdict was not against the weight of evidence, and that there had been no misdirection.]

(1) [1895] 1 Q. B. 119, 126.

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With regard to the counts under the Perjury Act, 1911, numbers two, four, six and eight, the contention was that the appellants were not indictable. The charge therein made was one of knowingly and wilfully making statements false in a material particular in the returns of income tax. That offence was based on s. 5 (*b*) of the Perjury Act, 1911. The objection taken was that by virtue of s. 16, sub-s. 3, of the Act this offence was not one for which the appellants were indictable, because in the proviso to that sub-section there is a saving clause which has the effect of preventing those persons from being indictable who for making such false statements are under any Act passed before the Perjury Act, 1911, "punishable only" on summary conviction. It was said that this offence was punishable only under s. 94 of the Finance (1909–10) Act, 1910, with a penalty, on summary conviction, of imprisonment with hard labour not exceeding six months; and that as that Act was passed before the Perjury Act, 1911, and has not been repealed, the result must be that the appellants are only liable to be summarily convicted and to be imprisoned for six months, and, consequently, are within the words of the proviso, and cannot be indicted. In our judgment the argument on their behalf has failed to establish that view. The words "punishable only" in the proviso mean that the accused is not liable to be punished otherwise than on summary conviction. But that is not the case here, because by s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, when a person is charged before a Court of summary jurisdiction with an offence in respect of which he is liable on summary conviction to imprisonment for a term exceeding three months, and which is not an assault, he may claim to be tried by a jury.

If this had been an offence for which a fine or imprisonment for three months only could be imposed, and it was not an assault, then it would have been an offence which could only have been dealt with on summary conviction. But once it is realized that more than three months' imprisonment can be awarded, it then follows that this offence is not "punishable only on summary conviction," and is therefore, under the

earlier part of s. 16, sub-s. 3, and s. 5 (*b*), indictable at the option of the prosecution. Consequently in our judgment there is no substance in the point raised, and, the offence being indictable, all the consequences, including the punishment which can be awarded, follow: *Reg.* v. *Brown.* (1) The conclusion we have come to is that the Legislature when it passed the Perjury Act, 1911, which is a consolidating Act, intended to bring into s. 5 a series of offences which had been dealt with in different Acts of Parliament, and make them indictable with a maximum punishment of two years' imprisonment. But Parliament did not intend to make offences indictable which had not been indictable previously, and consequently it enacted the proviso to sub-s. 3 of s. 16 of the Act in order to guard against a possibility of their having overlooked some section dealing with a trivial offence which would nevertheless come within the earlier part of the subsection, and might result in a person who hitherto had not been liable to more than three months' imprisonment having his offence magnified into an indictable offence punishable with two years' imprisonment.

For these reasons the appeals must be dismissed. With regard to the sentences, as this seems a proper case, we modify them to this extent, that we alter them to imprisonment in the second division.

Appeals dismissed. Sentences modified.

Solicitors for appellants: *Minet, Pering Smith & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1895] 1 Q. B. 119.

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Nov. 18, 19.

LIMERICK STEAMSHIP COMPANY, LIMITED *v.* W. H. STOTT AND COMPANY, LIMITED.

[1920. L. 737.]

Charterparty — Baltic round Voyage — Ice-bound Port — Port kept Open by Icebreakers.

A steamer was chartered for one Baltic round voyage in the winter time. By clause 16 she was not to be ordered to any ice-bound port nor was she obliged to force ice, and the charterers were to be liable for the detention of the vessel from any of the causes set out in that clause. The charterers ordered her to Abo, a port in Finland. That port would normally be frozen up so that vessels could not enter or leave, but it is kept open all the year by means of icebreakers. The vessel on her voyage to and from Abo encountered ice, sometimes the ice was thin enough for the vessel to force her way through without the help of icebreakers, sometimes she failed to force her way through the ice. Eventually with the help of an icebreaker she reached Abo. She however sustained considerable damage from the ice and the owners sought to recover that damage from the charterers on the ground that they had committed a breach of the charterparty by ordering the vessel to a port which was an ice-bound port to enter which the vessel would be obliged to force ice:—

Held, that Abo was not an ice-bound port within the meaning of the charterparty as it was a port which, owing to the use of icebreakers, vessels could enter and leave at any time of the year, and that therefore the charterers had not committed a breach of their charterparty in ordering the vessel to that port. Further, that the charterers were not liable for the damage sustained by the vessel through ice on her voyage to and from Abo, as under the charterparty the steamer was not bound to force ice, and that therefore if she did force ice it was at her own risk.

Action tried by Bailhache J.

The plaintiffs brought the action to recover damages for the breach by the defendants of a charterparty.

The plaintiffs, who were the owners of the steamship *Innisboffin*, chartered her to the defendants by a charterparty dated November 25, 1919, for one Baltic round voyage. The charterparty, which was on the Baltic and White Sea Conference Uniform Time Charter, 1912, form, provided that the steamer should be delivered to the charterers at Huelva, and should be employed between good and safe ports or places within the limits of one Baltic round, where she could

always safely lie afloat, as the charterers or their agents should direct. Clause 2: "The owners shall provide and pay for . . . . the insurance of the steamer. . . . ." Clause 3: "The charterers shall provide and pay for . . . . all other charges and expenses whatsoever, except those above stated" [which were not material to this action]. Clause 7: "The steamer (unless lost) shall be redelivered on the expiration of this charterparty in same good order as when delivered to the charterers (fair wear and tear excepted), at an ice-free port in charterers' option in the United Kingdom." Clause 9: "The captain shall prosecute his voyages with the utmost dispatch. . . . ." Clause 14: "Throughout this charter losses or damages . . . . arising or occasioned by the following causes shall be absolutely excepted, viz.: . . . . negligence default or error of judgment of the pilot, master, or crew, or other servants of the owners, in the management or navigation of the steamer." Clause 16: "The steamer shall not be ordered to . . . . any ice-bound port or any port . . . . where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after completing loading or discharging, nor shall steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for charterers' account. Nevertheless, if on account of ice the captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged he shall have liberty (but not be obliged) to sail to a convenient open place and await charterers' fresh instructions." Clause 26: "The steamer shall be delivered under this charter about 30th November, 1919. . . . ."

The steamer was duly delivered to the defendants and came on hire shortly after the date of the charterparty. The defendants in January, 1920, ordered her to proceed to the port of Abo in Finland. At that time of the year a great portion of the Baltic is icebound. There are a few ports on the southern shore of the Baltic which are normally free from ice, but the majority of ports become icebound unless kept open by icebreakers. The port of Abo is kept open

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in the winter by icebreakers. The *Innisboffin* on her voyage to Abo encountered ice, which was sometimes sufficiently thin for her to force her way through without the aid of an icebreaker. On one or two occasions she attempted to force her way through without the aid of an icebreaker and failed. Eventually with the aid of an icebreaker she got through the ice and arrived at Abo. In the course of her voyage to Abo and her return voyage from Abo she was however very severely damaged by the ice, the damage so caused amounting to 2600*l.*

The plaintiffs alleged that the port of Abo was an icebound port or alternatively that it was a port where there was a risk that in the ordinary course of things the steamer would not be able to enter or to leave on account of ice, and further that Abo was a port to enter which the steamer might be obliged to force ice and that consequently the charterers committed a breach of the charterparty in ordering the steamer to proceed to that port and that they were therefore liable for the damage sustained by the steamer by ice in entering and leaving the port and the incidental expense to which the plaintiffs were thereby put.

After loading a cargo at Abo the charterers ordered the *Innisboffin* to proceed to Manchester. In order to reach that port the steamer had to proceed up the Manchester Ship Canal. She was able to pass through the canal loaded on her way to Manchester, but after she had discharged her cargo at Manchester the draft of the steamer was such that she could not proceed down the canal and clear the bridges without cutting her masts.

The plaintiffs alleged that Manchester was not a good and/or safe port in that the steamer could not leave that port at light draft unless her masts were cut, and that the charterers committed a breach of the charterparty in ordering the steamer to proceed to that port, and were therefore liable for the cost of cutting and repairing the masts.

The defendants while denying liability paid into Court (inter alia) the sum claimed by the plaintiffs for the cost of cutting and replacing the masts.

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MacKinnon K.C. and *Claughton Scott* for the plaintiffs. Abo is an icebound port and the defendants committed a breach of clause 16 of the charterparty in ordering the steamer to proceed to that port. An ice-bound port means a port where ice normally collects in such quantities as to make access to that port impossible in the ordinary way, and a port is icebound notwithstanding the fact that an icebreaker is kept there by the use of which it is possible for ships to enter and leave that port. But for the use of an icebreaker Abo would be completely sealed up so that vessels could not enter or leave. There are a number of ports in the Baltic which are not ice-bound ports, and the clause was clearly intended to limit the number of the ports to which the ship could be ordered. The clause cannot be read as meaning that the steamer shall not be ordered to any ice-bound port not provided with an icebreaker. That construction would make the question as to whether or not a port is an ice-bound port depend upon the strength of the icebreaker. Although the clause provides that the steamer shall not be obliged to force ice, nevertheless if she does force ice in order to get to the port to which she has been ordered by the charterers the owners are entitled to recover from the charterers the damage sustained by the ship through forcing her way through the ice in order to reach the port to which she has been ordered by the charterers even although the charterers did not commit a breach of charterparty in ordering the ship to that port. By the terms of clause 9 the voyage had to be prosecuted with the utmost dispatch, and therefore the ship could not wait but had to do her utmost to reach the port. All the matters dealt with in clause 16 are matters which are likely to cause damage to the ship, and the clause ought not to be read as merely imposing upon the charterers a liability for the detention of the ship from those causes if they commit a breach of the clause.

R. A. Wright K.C. and *Jowitt* for the defendants. The port of Abo is not an ice-bound port within the meaning of clause 16 of the charterparty as it is kept open by icebreakers. An ice-bound port means a port which is not accessible by

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reason of ice. Any port however to which access is possible by reason of the fact that an icebreaker is kept there does not come within the term "icebound." Any other construction would render the charterparty unworkable, as nearly all the ports in the Baltic are naturally icebound in the winter. It was contemplated by the parties that the *Innisboffin* would make her voyage to the Baltic in the winter. Even if Abo is an ice-bound port the steamer was not bound to proceed there, but as the plaintiffs voluntarily accepted the nomination of that port as the port of discharge on the outward voyage and allowed the vessel to proceed to that port they took the risk and are estopped from complaining of the defendants' nomination. Under clause 16 the steamer was not bound to force ice in order to reach Abo, but if the captain voluntarily chose to force the vessel through ice, thereby causing the vessel to sustain damage, that was damage caused by negligence in the navigation of the steamer, and the plaintiffs cannot recover from the defendants in respect of such damage. The proper course for the captain to do was to refuse to go to an ice-bound port or to force ice, but if he chose to take those risks and the vessel sustained damage by reason of the ice the defendants cannot be made liable under the charterparty for that damage.

MacKinnon K.C. replied.

BAILHACHE J. The question whether or not the plaintiffs are entitled to recover the damages sustained by the steamship *Innisboffin* depends entirely upon the construction of the charterparty. The charterparty is on the Baltic Uniform Time Charter Form and contains a clause, No. 16, which deals with ice. The rest of the clauses are the usual clauses in a time charter, including a clause that the steamer is to prosecute her voyages with the utmost dispatch. I mention that clause because Mr. MacKinnon has laid some stress upon that fact. The clause upon which Mr. MacKinnon principally relies is clause 16. [His Lordship read the clause and continued:] The only thing that is there dealt with is detention, and the clause provides that detention from any of the causes there

mentioned is to be for charterers' account, that is to say, that they are to pay the agreed rate of hire for the time during which the steamer is detained by any of those causes. The clause says nothing at all about damage to the steamer. It must be borne in mind that in the Baltic a few ports on the southern shore are normally and naturally open all the year round, that is to say, ice does not form in them, but that in the majority of the ports in the Baltic ice does form in the winter, although certain ports, as for instance Stockholm, are kept open during the winter by means of icebreakers. That is the case with the port of Abo, which is kept open by the Finnish Government by means of icebreakers. As I understand this charterparty what it provides is this: The charterers are to be at liberty to send this vessel to the Baltic in the winter—indeed, that is what they chartered her for, but they must not send her to a port that is icebound, that is to say, they must not send her to a port that is frozen up so that the vessel cannot enter, the reason being that inasmuch as the port will be frozen up for several months the steamer will be delayed for an indefinite time and the owners do not want their steamer unreasonably detained; for that reason the charterers are not entitled to send the vessel to a port that is in fact icebound. Further, even although the vessel is able to enter a port which is normally icebound, still she is liable to be icebound in that port before she can get away and thereby be unreasonably detained. Therefore the owners exclude those two things—the charterers are not to send the vessel to a port that is blocked with ice, and they are also not to send her to a port where, although she may get in, there is a risk that she may be caught in the ice and be unable to get away after completing loading or discharging. The charterers are only at liberty to send her to a port that is not icebound. In the Baltic however it very often happens that although the port is not itself icebound, as it is kept open by icebreakers, yet the passage to the port does become icebound or is partly or entirely closed with ice.

Now although the charterers are entitled to nominate a port which is not icebound, yet if in the course of her voyage

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to that port the vessel encounters ice which prevents her prosecuting her voyage she is not under the charterparty bound to force the ice, and therefore it is not a breach of contract on the part of the shipowners if she does not go to that port. Clause 16 provides for all those eventualities; it also contains a provision for another eventuality, and that is this: If the charterers have ordered the vessel to a port which was not at the time icebound, but she is there so long that there is a danger if she remains longer she will be caught in the ice and not be able to get out, the captain may if he likes, although he is not bound to do so, leave the port and go to the nearest port when there is free and open water and then await charterers' instructions. If however he does not leave the port but remains there and is caught in the ice then the detention of the vessel from that cause is for charterers' account.

The real contest in this case is whether Abo was or was not an ice-bound port. If Abo was not an ice-bound port, then it was no breach of contract on the part of the charterers to order her there. Abo is a port which if left to itself would undoubtedly become in the course of the winter, particularly in January and February, frozen to such an extent that no vessel could possibly get either in or out, but the port is kept open, as I have said, by means of icebreakers. Now is that, within the meaning of the charterparty, an icebound port? In my judgment it clearly is not. It is true that Abo would be an icebound port if artificial means were not taken to prevent it becoming icebound, but artificial means are taken by the Finnish Government to prevent it becoming an ice-bound port, and it is a port which, so far as the port itself is concerned, a vessel can enter and leave at any time of the year owing to the ice being constantly kept broken. There was therefore no breach of contract on the part of the charterers in sending the *Innisboffin* to Abo. On the way to Abo she encountered ice and was damaged in proceeding through the ice. It is contended on behalf of the shipowners that even if it was no breach of contract on the part of the charterers to send the vessel to Abo still they are liable for

the damage which she sustained in getting there. I find it difficult to understand that proposition. I agree that if it were a breach of contract on the part of the charterers to send the vessel to Abo the damage that she naturally and properly sustained on the voyage to or from Abo, apart from the negligence of the master, would be for the charterers' account. But the charter expressly provides that, although Abo may be a port to which the vessel may be properly ordered, she is not bound to force the ice to reach that port unless the master chooses. It is left to his discretion; he may force the ice or he may refuse to proceed further by reason of the ice. In my judgment this action is founded on a misapprehension of what clause 16 provides. That clause, as I read it, does not throw the liability for any damage which the vessel may sustain upon the charterers if they commit no breach of contract with regard to the port to which they order the ship; the clause throws the liability for the detention of the vessel in the events there set out upon the charterers and gives the owners the option in certain cases not to proceed to ports nominated by the charterers if the ports fall within the terms of clause 16 through being icebound or if the route to those ports is impeded with ice. This disposes of the whole case with the exception of one small item.

The *Innisboffin* left Abo with a cargo for Manchester and in order to get there she had to proceed up the Manchester Ship Canal. Under the terms of the charterparty she could only be ordered to a safe port. When she went through the canal loaded on her way to Manchester her masts were just low enough to clear the bridges, but after discharging her cargo at Manchester she came up in the water, and when she proceeded down the canal from Manchester her masts would not clear the bridges and accordingly they had to be cut. In my judgment the expense of cutting the masts must fall upon the charterers, because they were only entitled to order the *Innisboffin* to a safe port, which means a port to which a ship can safely get and from which she can safely return. It was therefore a breach of contract for the charterers to order her to proceed to Manchester, and having committed

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a breach of contract they must pay the damages which flow from that breach of contract. That to my mind is the distinction between the damages sustained at Manchester and the damages sustained by the vessel through being ordered to Abo. The charterers committed no breach of contract in ordering her to Abo, and therefore they are not liable for any consequential damage, whereas they committed a breach of contract in ordering her to proceed to Manchester and therefore are liable for the consequential damages. The result is that there will be judgment for the plaintiffs for the comparatively small amount involved in cutting the masts in order to enable the *Innisboffin* to get to and from Manchester.

Solicitors for the plaintiffs : *William A. Crump & Son.*

Solicitors for the defendants : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

R. F. S.

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Dec. 16, 17, 20.

RAIKES *v.* OGLE AND ANOTHER.

[1920. R. 1874.]

Landlord and Tenant—Rent—Restriction—Increase since March 25, 1920—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1.

Sect. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "subject to the provisions of this Act, where the rent of any dwelling house to which this Act applies, ... has been, since March 25, 1920, or is hereafter, increased, then, if the increased rent . . . . exceeds by more than the amount permitted under this Act the standard rent . . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. . . . ."

Premises which on August 4, 1914, were let at a rent of 60*l.* a year, the landlord paying rates and taxes, were, by an agreement dated March 12, 1920, let by the plaintiff to the defendants "from March 25, 1920, for the term of three years thence next ensuing and afterwards as a yearly tenancy unless six calendar months' previous notice in writing shall be given by either party to quit at the end of the said term or on March 25 in any subsequent year . . . . at the yearly rent of 230*l.* payable by four equal quarterly payments . . . . the first of such payments to

be made on June 24 next." The defendants obtained the keys of the premises on March 25, 1920, and actually went into possession on March 26:—

Held, that by the agreement of March 12 the increased rent began to accrue on March 26; that the rent had therefore, within the meaning of s. 1, been "increased since March 25, 1920"; and that as the increased rent exceeded the standard rent by more than the amount permitted by the statute, the excess was, notwithstanding the agreement of March 12, irrecoverable from the defendants.

ACTION tried by Acton J.

The plaintiff claimed certain premises in the City for non-payment of the agreed rent by the defendants. The premises in question were three rooms at 15 New Broad Street, which, on August 4, 1914, were let in one letting on a yearly tenancy at 60*l.* per annum, the landlord paying rates and taxes. That tenancy terminated at Christmas, 1914. The premises were relet twice afterwards at slightly increased rentals, and the rent current in the early part of 1920 was 75*l.* a year. By an agreement of tenancy dated March 12, 1920, the premises were let by the plaintiff to the defendants "from March 25, 1920, for the term of three years thence next ensuing and afterwards as a yearly tenancy unless six calendar months' previous notice in writing shall be given by either party to quit at the end of the said term or on March 25 in any subsequent year . . . . at the yearly rent of 230*l.* payable by four equal quarterly payments on the four usual quarter days in each year, the first of such payments to be made on June 24 next." The plaintiff was to pay rates and taxes. The agreement contained a proviso entitling the plaintiff to re-enter in case the rent of 230*l.* or any part thereof should be in arrear for twenty-one days. The defendants obtained the keys of the premises on March 25, 1920, and they actually went into possession on March 26.

On July 2, 1920, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was passed, and the defendants when asked for payment of the quarter's rent which fell due on June 24, 1920, claimed that as the rent of the premises had been increased, since March 25, 1920, to an amount exceeding that permitted by the Act over the standard rent,

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the excess was, by virtue of s. 1, irrecoverable. The plaintiff contended that the rent had not been increased since March 25, 1920. Correspondence took place between the parties' solicitors, in the course of which the following facts were agreed: that on August 4, 1914, the rent of the premises was 60*l.* per annum, the landlord paying rates; that the proportion of rates then payable in respect of the premises was 11*l.* 10*s.* 7*d.*; that the rateable assessment for collection was 33*l.* 6*s.* 8*d.* in 1914 and in 1920; that the rates in 1914 were 3*s.* 5½*d.* and in 1920 4*s.* 10*d.* in the £; that if the defendants were successful in their contention, the yearly rent recoverable under the statute would be 81*l.* 11*s.* 8*d.* The defendants, later, paid 40*l.* 15*s.* 10*d.* into Court in respect of two quarters' rent.

Croom-Johnson and *F. S. Arnold Baker* for the plaintiff. The increase of rent took effect on March 25, 1920, when the keys were handed over, and therefore the position is unaffected by s. 1 of the Act. *Goldsmith* v. *Orr* (1) may at first sight appear to be against this view, but that case is distinguishable, because there it was not argued that the increase of rent became effective when the tenancy began; the argument was that the increase became effective when the agreement was entered into.

[ACTON J. Does not the increase of rent become effective when the quarter day comes and rent is payable—in this case June 24?]

No; rent accrues from day to day. This was a lease "from" March 25, and the Court will construe that word so as to effectuate the deeds of the parties: *Pugh* v. *Duke of Leeds*. (2) Here, from the fact that the keys were handed to the defendants on March 25 it is clear that the intention was that the tenancy should begin on that day: see also *Steele* v. *Mart* (3) and *Ackland* v. *Lutley*. (4) As was said by Parke B. in *Russell* v. *Ledsam* (5) a term, if it is to run from the date of the lease, includes the day of the date. There is

(1) [1920] W. N. 250; 89 L. J. (K. B.) 901.
(2) (1777) 2 Cowp. 714.
(3) (1825) 4 B. & C. 272.
(4) (1839) 9 A. & E. 879.
(5) (1845) 14 M. & W. 574, 582.

no difference between a tenancy commencing "on" a certain day and one commencing "from" a certain day: *Sidebotham* v. *Holland*. (1)

Wallington for the defendants. The tenancy in this case began on March 26, not on March 25. This is clear from the agreement itself, and from *Ackland* v. *Lutley*. (2) The parties intended March 25, 1921, to be included in the term, and therefore March 25, 1920, must be excluded: see *Meggeson* v. *Groves* (3) where Peterson J. commented on *Sidebotham* v. *Holland* (1); *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*. (4) The observations of Parke B. in *Russell* v. *Ledsam* (5) were obiter. The case is really concluded by *Goldsmith* v. *Orr* (6) where it was decided that rent is increased at the date when the increase becomes effective. Here the increase became effective on June 24. There has therefore been an increase of rent since March 25.

Croom-Johnson replied.

Cur. adv. vult.

Dec. 20. ACTON J. By agreement the only issue in this case is whether the rent agreed to be paid by the defendants to the plaintiff is such that the payment of it can be enforced in full during the continuance and operation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

[His Lordship stated the facts and continued:] The question which arises turns on s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The agreement of tenancy in this case was dated and executed on March 12, 1920. [His Lordship read the material part of the agreement set out above and continued:] There is no dispute in this case that the rent has been increased. The dispute is whether, within s. 1 of the Act, it is "since March 25, 1920," that the rent has been so increased. There are three dates any of

(1) [1895] 1 Q. B. 378.
(2) [1839] 9 A. & E. 879.
(3) [1917] 1 Ch. 158.
(4) [1891] 1 Q. B. 402.
(5) [1845] 14 M. & W. 574, 582.
(6) [1920] W. N. 250; 89 L. J. (K. B.) 901.

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which upon first impression might be suggested as the date at which the rent "has been increased." Those dates are, first, the date of the agreement of tenancy under which the rent was in the future to be paid; second, the date at which the increased rent "begins to run," that is, the date at which the agreement of tenancy provides that the rent shall begin to accrue; and third, the date at which the agreement provides that the rent shall first become payable. No date other than one of these three was suggested by any one as a possible date. The first of these three dates—namely, March 12, 1920, the date of the agreement of tenancy—is eliminated already by the decision in *Goldsmith* v. *Orr*. (1) It was common ground in this case that this is so. Of the two remaining dates it was not necessary to decide, and it is not in terms decided, in *Goldsmith* v. *Orr* (1) which is the material date. It does, however, appear that in the Divisional Court (2) both Bailhache and Sankey JJ. regarded the date at which the increased rent began to accrue as the material date, and the same view seems to be indicated in the judgment of Bankes L.J. in the Court of Appeal. There are passages in the judgment of Scrutton L.J. which it was said tended to show that in his opinion the material date was the date when the increased rent first became payable, but I doubt whether this is so. The argument for the tenant seems throughout to have been that the material date was the date when the increased rent began to accrue. My opinion, and it is not I think inconsistent with what authority there is, is that this latter date is the material date.

There remains the question, what that date in the present case is. It was contended for the plaintiff that it was March 25, 1920, and therefore that the rent had not "since March 25, 1920," been increased. It was contended for the defendants that it was March 26, 1920, and therefore that the rent had, since March 25, 1920, been increased. A number of authorities were cited and discussed. I do not think any useful purpose would be served by my reviewing

(1) [1920] W. N. 250; 89 L. J. (K. B.) 901.

(2) [1920] W. N. 81.

them at length. It is enough to say that upon these authorities, and especially *Ackland* v. *Lutley* (1) and *Sidebotham* v. *Holland* (2), as explained by Peterson J. in *Meggeson* v. *Groves* (3), I am of opinion that March 26, 1920, is the date at which it was by the agreement of March 12, 1920, agreed that the increased rent should begin to accrue.

I think it cannot be said that the result of this is to attach a too technical meaning to the word "since," as used in the statute, for I think the lay or popular view would be to the same effect. I think the ordinary meaning of the word used in the agreement of March 12, 1920, would be that the quarter day upon which the rent of a bygone quarter falls due and becomes payable is to be regarded as included in that quarter and not in the quarter thereafter next ensuing, so that June 24, 1920, would be included in the first quarter of the defendants' tenancy and March 25, 1920, by consequence excluded.

In my opinion, therefore, the rent has, within the meaning of the statute, been "increased since March 25, 1920," and as such increased rent exceeds by more than the amount permitted under the statute the standard rent, the amount of the excess is, notwithstanding the agreement of March 12, 1920, irrecoverable from the defendants. Of course, if the third of the three possible dates mentioned instead of the second were to be taken as the material date, a fortiori the same conclusion would be reached.

There will accordingly be a decree of forfeiture as asked by the plaintiff, but relief will be granted to the defendants upon payment of the agreed sum of 40*l.* 15*s.* 10*d.*

Judgment accordingly.

Solicitors for plaintiff: *Wilkinson, Bowen & Jackson.*
Solicitors for defendants: *John T. Lewis & Woods.*

(1) 9 A. & E. 879. (2) [1895] 1 Q. B. 378.
(3) [1917] 1 Ch. 158.

J. S. H.

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Nov. 4, 5.

CHARLES WADE AND COMPANY, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Carriage of Goods—Consignment Note—Signature—Incorporated Documents unsigned—"Owner's risk"—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

The plaintiffs delivered to the defendants a quantity of steel bars for conveyance from Birmingham to consignees at Ellesmere Port. The plaintiffs' name was printed at the top of the consignment note, which was the plaintiffs' own form, and in the body of the document were the words "at owner's risk." The defendants had some time previously sent to their customers, including the plaintiffs, notices referring to the defendants' two forms of consignment note—namely, "Owner's risk" consignment note, and "Company's risk" consignment note. One of the conditions on the defendants' "Owner's risk" note was that the company should not be liable for the loss of goods unless a claim was made in writing within fourteen days. The goods were not delivered to the consignees, but no claim was made within the time specified. In an action by the plaintiffs to recover the value of the goods, the county court judge held that the condition was just and reasonable, but that no special contract had been signed by the plaintiffs so as to comply with s. 7 of the Railway and Canal Traffic Act, 1854, and gave judgment for the plaintiffs:—

Held, that the effect of the words "at owner's risk" was to incorporate the company's "owner's risk" consignment note, and that the condition as to notice of claim therefore formed part of the special contract and was binding upon the plaintiffs.

Held, further, that as the evidence showed that the plaintiffs' signature appeared on the consignment note in order to authenticate it, it was immaterial that it was printed at the top and not at the foot of the document.

APPEAL from Birmingham County Court.

The action was brought to recover the sum of 20*l.* 7*s.* 8*d.*, the value of some steel bars entrusted by the plaintiffs to the defendants for conveyance from Birmingham to Ellesmere Port, which were lost in transit. On January 31, 1919, the plaintiffs consigned the goods in an open note addressed to the consignees at Ellesmere Port, and paid the carriage.

The consignment note (which was the plaintiffs' own form) was in the following terms:—

"From Charles Wade & Co.,
Midland Ironworks,
Aston Road,
Birmingham.

Jan. 31, 1919.

London and North Western Railway Co.

Deliver in as good condition as received to Messrs. F. A. Frost & Son, Ellesmere Port :—

	cwt.	qr.	lbs.
Mark XX	10	1	10

40 Bars
C. paid
At owners' risk.

G. BROWNING
Signs."

Upon the non-arrival of the goods some inquiries were made at the company's offices, but no written complaint as to the loss was made till April 16. The defendants resisted the claim on the ground that it had not been made within the time specified in their conditions, and the question raised was whether the conditions were binding upon the plaintiffs. The defendants disputed their liability for the loss on the ground that on June 19, 1917, they had addressed to a number of their customers, including the plaintiffs, a notice referring to the defendants' two forms of consignment note—namely, "Owner's risk" consignment note and "Company's risk" consignment note. A further notice to the same effect, dated May 27, 1918, was sent to the plaintiffs, but they did not acknowledge either of the notices.

Condition 3 of the conditions on the company's owner's risk consignment note was as follows: "The company shall not be liable for loss from or damage or delay to a consignment . . . . unless a claim be made in writing within 3 days after the termination of the carriage of the consignment or any part thereof or in the case of traffic to places outside the United Kingdom the termination of the carriage by a railway company of the United Kingdom nor for non-delivery of a consignment unless a claim be made in writing within 14 days after its receipt by the first contracting company."

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The plaintiffs contended that they were not bound by the condition (1.) because it was not just and reasonable; and (2.) because it did not comply with s. 7 of the Railway and Canal Traffic Act, 1854, because the special conditions were not signed by the party delivering the goods for carriage. The county court judge held that the condition was just and reasonable, but that it was not signed by the plaintiffs so as to comply with the requirements of s. 7, and gave judgment for the plaintiffs.

The defendants appealed.

Eustace Hills K.C. (*R. Willes* with him) for the defendants, appellants. The county court judge was wrong in holding that the defendants were liable to the plaintiffs for the loss of the steel bars. The plaintiffs have brought the present action against the defendants as common carriers. The defendants are not liable as common carriers.

First, there was a special contract in writing between the parties respecting these bars, duly signed by the plaintiffs under s. 7 of the Railway and Canal Traffic Act, 1854, by the terms of which contract the defendants were protected from liability for loss of the bars. That contract was contained in more than one document. The letter which the defendants sent out to their customers in June, 1917, referred to the defendants' owner's risk consignment note. One of the conditions thereon was that the defendants should not be liable for the loss of goods consigned, unless a claim was made in writing within 14 days, and that was a just and reasonable condition: *Lewis* v. *Great Western Ry. Co.* (1) The consignment note under which the plaintiffs despatched the bars in question on January 31, 1919, was their own form. Though the name of the plaintiffs appeared at the top of the note and not at the foot of it, the note was duly "signed" by the plaintiffs within the meaning of s. 7, as is shown by the authorities relating to the signing of a memorandum under the Statute of Frauds.

In the body of the consignment note were the words

(1) (1860) 5 H. & N. 867.

"owner's risk," the effect of which was that the conditions in the defendants' owner's risk consignment note, and among them the above-mentioned condition as to notice of claim, were incorporated into the plaintiffs' consignment note, and together with that note constituted a special contract duly signed within the meaning of s. 7 : *Buckton & Co.* v. *London and North Western Ry. Co.* (1) ; per Lord Westbury in *Peek* v. *North Staffordshire Ry. Co.* (2) ; and see *Shaw* v. *Great Western Ry. Co.* (3) The present case is distinguishable from *Peek* v. *North Staffordshire Ry. Co.* (2), for there the signed document did not incorporate the condition.

Secondly, apart from s. 7 of the Act of 1854, the defendants cannot be made liable as common carriers. The plaintiffs only proved at the trial that the goods were not delivered. They did not prove that they were lost by the negligence of the defendants. It does not appear that they may not have been lost by the act of God or by some other cause for which a common carrier is not liable. If, as the defendants allege, the contract contains the condition that they are not to be liable for loss of goods unless a claim is made within 14 days, that is a provision which is inconsistent with the character of a common carrier.

Hurst K.C. (*D. L. Finnemore* with him) for the plaintiffs. These goods were delivered to the defendants and the carriage was paid. The defendants were therefore bailees for reward. It is admitted that the goods were received by the railway company, but were not delivered to the consignees. The defendants are forced to say that the contract was contained in the two previous notices, which they contend are incorporated in the consignment note by the words "owner's risk." A special contract under s. 7 of the Act of 1854 must either be in one document, or if it is suggested that it is contained in several, the signed document, in order to embody the others, must either set them out, or so clearly refer to them that they necessarily become part of the contract : *Peek* v. *North Staffordshire Ry. Co.* (2) per Lord Westbury.

(1) (1916) 87 L. J. (K. B.) 234. (2) (1863) 10 H. L. C. 473, 568.
(3) [1894] 1 Q. B. 373.

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Here there was no such clear reference to the previous documents. Whether a name printed across a document was intended to be a signature is a question of fact. There was evidence to support the finding of the county court judge that there was here no signed contract.

Eustace Hills K.C. replied.

ROWLATT J. In this case the plaintiffs sued the defendant company for the loss of certain steel bars entrusted to them for conveyance, and the defence of the company was that a condition formed part of the contract between the parties under which a claim must be preferred within a certain time in order to fix the company with liability, and that that had not been done. The condition is one of several conditions which are printed upon the consignment notes of the company, both in respect of goods to be conveyed at carrier's risk and in respect of goods to be conveyed at owner's risk. The company had taken up the position (which they had conveyed to the trade, including the plaintiffs, by circulars) that if owners used their own consignment notes, they must put upon them the clause that the goods were to be carried at carrier's risk if that was desired, or the clause that they were to be carried at owner's risk if that was desired, and that if this were not done, some other conditions would apply. These goods were consigned by the plaintiffs upon a consignment note of their own which bore at the head of it their name and address, and at the bottom the words "at owner's risk." Under the Act of 1854 any condition must be just and reasonable, and the learned county court judge has found that the condition referred to here is just and reasonable. But under the Act there are two other requirements; there must be a special agreement between the parties, and it must be signed by them. Those are really two distinct inquiries, because you may find that there is no doubt a contract, but there must not only be a contract, but a contract which is signed by the parties. Signing a contract means that the parties must sign a contract which is wholly in writing, and the question here is whether those two conditions

have been complied with. I think that the learned county court judge has found that there was a contract, though upon his judgment it is not free from doubt. Upon the facts that he has stated, however, I do not think that he could have found otherwise. It is said by Mr. Hurst that there was evidence that the consignors had always said that they were not bound by this condition 3; and that as they sent their goods forward having stated that, it must be a question of fact whether in this case they had waived their position. I do not think there is anything in that. If it was a question of fact, I think the learned judge has found it, but I am dealing with the way in which Mr. Hurst put it. I do not think the county court judge could have found in accordance with that contention. The evidence was very slight. The plaintiffs merely said they were not bound by the condition, which may have been on the ground of its not being just and reasonable or on the other ground; but assuming that they referred to the condition when they sent the goods, I do not think it would be open to them to say they were sending them with a mental reservation of their own which was not incorporated in the contract. Then it was said that, so far as the question of whether there was a contract or not was concerned, the case had been conducted before the county court judge on the footing that the words "at owner's risk" were to be read out of this document. I cannot conceive how that could have been done. The document was the consignment note. The plaintiffs put it forward as the foundation of their case, and as proving their consignment, the acceptance of the goods under it being testified by the signature of the representative of the railway company. Without a suit for rectification of the document, I do not think that it is open to the plaintiffs to say that the undeleted words which appear upon the face of the consignment note can possibly be excised.

With those remarks I pass from the question as to whether there is a contract, because I think that this case was dealt with by the county court judge on the footing of an affirmative finding in that respect. But I must refer to the

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concluding words of the county court judge's judgment, which is the only thing that has caused me any difficulty. He said: "On the facts of this case I find that this condition was just and reasonable, but it was certainly not signed so as to comply with the requirements of section 7." Then he goes on to use these remarkable words: "No doubt an agreement may arise by conduct as well as by signature, but the facts are not sufficient to enable me to draw an inference, nor was it contended that I should be justified in doing so." I do not think that the learned judge could possibly have intended to say that the facts were not sufficient to enable him to draw the inference that there was a contract apart from the question of signature. If that was not contended, there was nothing to discuss, no matter for argument, and the whole thing would have been pure waste of time. I am certain he could not have meant that, because he goes on: "Holding as I do that that signature of the plaintiff firm was essential to enable the defendants to avail themselves of the defence put forward, it follows that the defendants' ground of defence fails." I think that what he was intending to say was that the whole point of the case was whether there was a signed contract, and I think it is the whole point. The signed contract must be a contract contained in documents to which the signature is appended, but it need not be in one document only, nor need there be a signature on every document, but as Lord Westbury said in *Peek* v. *North Staffordshire Ry. Co.* (1), the condition must either be set out in the document that is signed or must be incorporated with the document by direct reference. Those words, of course, only lay down a principle which is exemplified in many other cases, and in their application to any particular case, the facts and the language used must be looked at sensibly and reasonably according to the true meaning of the words as between the parties. In *Peek* v. *North Staffordshire Ry. Co.* (2) Blackburn J., in giving his opinion, put very carefully the principle upon which evidence is admitted bearing upon the effect of the contract. Whenever anything is mentioned in a contract

(1) 10 H. L. C. 473, 568. (2) 10 H. L. C. 473, 518, 519.

you must identify what it relates to. If the name of the most celebrated person or thing is mentioned, still in principle it has to be identified. If a person or thing is not very well known, the evidence may be difficult; if they are well known, it may be easy, but the principle is the same. That is what Blackburn J. in this passage, quoting from Vice-Chancellor Wigram's book on Extrinsic Evidence, calls "explanatory evidence." It is evidence to show what the written word refers to; but the evidence which cannot be given is evidence which goes to show what the parties intended as distinct from what they have said. You may have evidence to show what the parties said, but not what they intended apart from the meaning of the language used as applied to the things to which it relates. In that case there had been communications between the parties in which the consignor was informed that unless he consigned his goods to be insured, certain consequences would result. He consigned his goods not to be insured, and it was said that that incorporated the consequences referred to. The House of Lords took the contrary view. Mr. Justice Blackburn explained the reasons. You would have to give evidence to show what the consequential results of delivering goods to be carried without insurance would be. The words were merely that the goods were not to be insured, but something had passed between the parties which showed that there would in that case be some consequential results. They might be anything. You would have to give parol evidence to show what they were. Mr. Justice Blackburn was of opinion that that was not a contract depending upon a document which could be construed without parol evidence, other than evidence which merely showed what the words meant. In this case it seems to me that the position is different. I think that one cannot escape from the conclusion upon the evidence before the county court judge that the phrase "at owner's risk" here simply refers by way of a short title to a document with printed conditions upon it—namely, the defendants' owner's risk consignment note; and therefore when you find the words "at owner's risk" in the plaintiffs' consignment note, it is the same as if

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it had been written out "at owner's risk as per the Company's consignment note." That is what the words really mean. The words are used as a label in order to identify another document. On these grounds I think the appeal succeeds.

McCARDIE J. This appeal raises questions of some importance, and they are questions of considerable difficulty. In January, 1919, the plaintiffs despatched some steel bars by the defendants' railway from Birmingham to Ellesmere Port under a consignment note. The goods were never delivered by the railway company, and the plaintiffs claimed damages for breach of contract. The answer to the claim was that under a condition printed on the company's owner's risk consignment note the plaintiffs were debarred from claiming unless the claim was made within a specified time. The question at the trial was whether the plaintiffs were bound by that condition. [The learned judge then read the plaintiffs' consignment note and continued:] The question is whether or not that document signed by the plaintiffs embodies condition 3 of the defendants' owner's risk consignment note. This involves a consideration of s. 7 of the Railway and Canal Traffic Act, 1854, which provides that a railway company cannot escape from the consequences of negligence in receiving or delivering goods by conditions, unless the conditions are held by the Court to be just and reasonable. The section further provides that "no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage." Now, it is to be observed that the section does not provide any special form of contract. It uses the words "special contract," which are in themselves rather singular, and I am not aware that the words are so used in any other part of the Act. What is the meaning of those words "special contract"? In my view, having regard to the history of railway company legislation, it is clear that they

do not mean a contract with special formalities; the words have a totally different meaning, and the origin of the words springs from events which took place before the Carriers Act, 1830. It was quite common before that Act was passed, for common carriers to limit their liability by the publication of public notices, and if those notices were publicly exhibited, the carrier could escape from responsibility even for serious negligence, and even though the notice was not brought home to the mind of the person who consigned the goods. The matter is put most concisely by Wright J. in *Shaw* v. *Great Western Ry. Co.* (1), where he says: "For some time before 1830 it had become settled that he could do this"—that is, limit his liability even for negligence—"by a mere public notice, although not 'brought home' to the customer in any way." An interesting example of the law that then prevailed is to be seen in the summing up of Lord Ellenborough in *Leeson* v. *Holt.* (2) When the Act of 1830 was passed, it contained s. 6 which, after dealing with other matters, said: "Provided always . . . . that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such . . . . common carrier, and any other parties, for the conveyance of goods and merchandizes." The words "special contract" are there used. The meaning of that is this, that if a public notice, whatever it might be, was brought home to the customer, a special contract was to be taken to have been entered into. As it was put by Wright J. in *Shaw's Case:* "After the Act of 1830, it was necessary for him to show a special contract for that purpose; but a general notice 'brought home' to the customer was held to be a special contract, because the customer who sent his goods after notice of the condition was held to have assented to it." Therefore the words "special contract" in s. 7 of the Act of 1854 refer, in my view, to a special contract of the character which I have indicated. It is obvious that that special contract, so far from being a contract characterised by strict formality, was a bargain characterised by the very opposite features. Sect. 7 required that this special contract

(1) [1894] 1 Q. B. 373, 381. (2) (1816) 1 Stark. 186.

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should be signed. Now, it is clear since *Peek's Case* (1) that a special contract must be contained in a document or documents, because otherwise it cannot be signed, but that it need not necessarily be in one document is clear on the authority of Lord Westbury in that case where he said: "Such special contract in writing, signed by the party delivering the goods, must itself, either in terms or by distinct reference, set out or embody the condition in question. But I am of opinion, that those words 'not insured' do not refer to the written condition, or afford any ground upon which the written condition can be regarded as incorporated with the letter." The same point is referred to in Lord Cranworth's opinion. He said: "There is no written document signed by the person delivering the goods, either stating the terms on which, according to the fourth plea, the marbles were to be carried, or referring to any other document which on general principles of law could be referred to, and which would prove those terms." Therefore the contract need not be contained in one document, but may be in several. Consequently, the only question here is whether or not there is a contract, not indeed complete in itself, but which embodies or incorporates another document. It is quite true that this note signed by the plaintiffs does not expressly refer to the defendants' owner's risk consignment note, but I take it that the only rule which can be satisfactorily applied here is the rule which has been established with regard to decisions under the Statute of Frauds. I think that the effect of the decisions upon that statute is well stated at p. 227 of Leake on Contracts, 3rd ed.: "The note or memorandum may consist of several writings, if sufficiently connected by internal reference either direct or inferential; and extrinsic evidence is admissible to apply the references and to identify the writings referred to. Thus a correspondence between the parties by letters sufficiently connected together by their contents, and containing or referring to documents containing the terms of the contract, constitutes a sufficient note in writing. A letter acknowledging an agreement according to 'instructions' given to a

(1) 10 H. L. Cas. 473, 568, 571.

solicitor, where parol evidence was admitted to identify the instructions. So a letter referring to 'our arrangement,' which was identified with a previous memorandum of terms." In my view, the decisions on the Statute of Frauds are decisions which may properly be applied to the present case. If so, we have to see whether or not this document embodies or incorporates any other document. It says "at owner's risk." How are those words to be interpreted? I conceive that although there happened here to be some special statutory requirements, yet this is a mere business document intended to be a business record of a transaction, and hence, as in any case which may arise in the Commercial Court, we are to adopt the principle stated by Mellish L.J. in *The Teutonia* (1), where he said: "A mercantile contract which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties." That being so, what is the fair business meaning of these words "at owner's risk"? The county court judge, as he was bound to do and as we are bound to do, looked at the circumstances of the case to see what happened between the parties. In 1917 and 1918 the company had laid before the plaintiffs two notes, one an owner's risk note, and the other a carrier's risk note, the former the lower rate of carriage, the latter the higher rate. Every one who sends goods by a railway company, every business man, knows of the existence of those two notes as well as he knows of the existence of a bill of exchange, and that being so, the plaintiffs obviously knew perfectly well that they could send goods at owners' or at carriers' risk, and they themselves printed the words "at owner's risk" on their consignment note. I think it is clear that in doing that they were not employing a mere vague phrase, but were in effect saying: "We are sending these goods upon the terms of the company's 'owner's risk' consignment note." The words "at owner's risk," to my mind, represent that they were sending the goods upon the company's owners' risk consignment note. The result is that having regard to

(1) (1872) L. R. 4 P. C. 171, 182.

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the circumstances the words do incorporate the document called the "owner's risk consignment note."

That being so, there is, in my opinion, a special contract between the parties within the meaning of s. 7 subject to the question of signature. My Lord has put the matter more forcibly than I can do, but I would add this, that I think it is impossible to sever different branches of law, and to have one class of signature for the Statute of Frauds and another class for s. 7 of the Act of 1854. It is perfectly clear that under the decisions upon the Statute of Frauds the signature may be at the top, the bottom, or in the body of the contract. It may be a stamp, a mark, or an initial, in print or lithograph. In my view, having regard to those decisions, the words "Charles Wade & Co., Ld.," must be taken to be a verification of the document handed in by the plaintiffs to constitute the contract between the defendants and themselves.

I think it right to refer to the decision of Astbury J. in the case of *Buckton & Co.* v. *London and North Western Ry. Co.* (1) There, so far as I can see, the facts and documents were substantially the same as regards the question of signature. There was a printed signature "Joshua Buckton & Co., Ld.," in the centre of the note there signed by the plaintiffs. Astbury J., after considering the authorities under the Statute of Frauds, decided that the principle of those cases applied, and that therefore the special contract which he held to exist in that case was signed within the meaning of s. 7 of the Act of 1854. This Court by its present decision adopts the lucid judgment of Astbury J. in that case.

I should like to add that I had meant to refer to the case of *Sheers* v. *Thimbleby & Son* (2) in the Court of Appeal. Many authorities are there reviewed, and the decision illustrates the extent to which the doctrine of incorporation of documents has been carried under the Statute of Frauds. For these reasons I think that this appeal should be allowed.

ROWLATT J. I perhaps ought to have dealt with the question of the signature being at the top instead of at the

(1) 87 L. J. (K. B.) 234. (2) (1897) 13 Times L. R. 451.

bottom of the consignment note. I entirely agree with what has fallen from my learned brother. It seems to me that there is no question of fact in that, when you once find that the document is delivered with the intention that the name of the party printed on it should identify and give authority to the document as coming from him.

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Appeal allowed.

Solicitor for defendants: *M. C. Tait.*

Solicitors for plaintiffs: *Burn Lowe, Sons & Co., Birmingham.*

F. F. C.

Considered. DANISH MERCANTILE CO. LD. *v.* BEAUMONT [1951] 1 Ch. 680

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Oct. 27, 28.

Crown—Prerogative—Ship—Requisition—Urgent national Necessity.

In January, 1916, the Admiralty, purporting to act under the powers conferred by the Proclamation of August 3, 1914, requisitioned a ship, and, in March, 1916, sent her on a voyage from Huelva to Philadelphia with a cargo of iron ore to be used by munition makers in America in the manufacture of munitions of war on behalf of the British Government. In the course of her voyage the ship sustained damage by marine perils. Disputes having arisen between the owners and the Admiralty as to (inter alia) the right of the latter to send the ship on the voyage in question, these were referred to arbitration, in the course of which it was contended on behalf of the owners that the use of the ship on the particular voyage was not justified either under the Proclamation or under the prerogative of the Crown:—

Held, that there being at the material time an urgent national necessity, the use of the ship on the voyage in question was justified both under the Proclamation and under the prerogative of the Crown.

SPECIAL CASE stated by arbitrators under s. 19 of the Arbitration Act, 1889.

On January 26, 1916, the steamship *Crown of Leon* was requisitioned by the Lords Commissioners of the Admiralty under the Royal Proclamation of August 3, 1914, for use on Government service. In March, 1916, the ship, being then under requisition, by order of the naval authorities proceeded on a voyage from Huelva to Philadelphia with a cargo of iron ore. In the course of the voyage the ship encountered very

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severe weather and sustained damage. Disputes arose between the owners of the ship and the Admiralty with regard to the right of the Admiralty to send the ship on the said voyage and also on the question whether the liability to pay for the necessary repairs fell upon the owners or upon the Admiralty. These disputes were referred to the Admiralty Transport Arbitration Board.

By an order made in chambers, and subsequently affirmed by a Divisional Court and the Court of Appeal, the arbitrators were ordered to state a case for the opinion of the Court upon the following questions of law arising on the arbitration: (A) Whether the Admiralty had the right under the Proclamation of August 3, 1914 (1), or otherwise to employ the *Crown of Leon* for the voyage from Huelva to Philadelphia with ore, freight on which was payable to the Admiralty, and whether the owners were entitled to receive

(1) A Proclamation dated August 3, 1914, "authorising the Lords Commissioners of the Admiralty to requisition any British ship or British vessel within the British Isles or the waters adjacent thereto.

"Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

"And whereas the measures approved to be taken require the immediate employment of a large number of vessels for use as transports and as auxiliaries for the convenience of the fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

"Now, therefore, We authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their secretary or under the hand of any flag officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our Service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose."

The Admiralty Transport Arbitration Board was appointed by a notification of August 11, 1914, for which a notification of August 31, 1914, was subsequently substituted.

from the Admiralty any and what additional hire, payment or compensation, over and above the monthly hire, when it should be finally adjusted, in respect of the use of the vessel on the said voyage. (B) Whether the Admiralty were not liable for the damage sustained by the vessel in the course of the voyage and by reason of the carriage of the cargo. (C) Whether marine risks should be deemed to be borne by the Admiralty or by the owners, unless the arbitrators should decide to state their award in the form of a special case.

The special case stated under the above order dealt in the first place with question C. The case, after setting out certain facts found by the arbitrators, which in view of the decision of the Court it is unnecessary to state in detail, proceeded as follows: The arbitrators find as a fact that it was understood between the parties, and, subject to the opinion of the Court, they find that it was impliedly agreed between them, that the vessel while under requisition should and would be at the risk of the owners as regards the sea risk, and at the risk of the Admiralty as regards the war risk.

With regard to question A the special case was as follows: The arbitrators find as facts that the vessel being then in the Mediterranean under requisition was ordered by the Admiralty to load and did load at Huelva a cargo of ore or pyrites for Philadelphia. She loaded under the superintendence of the master employed and paid by the owners, and the master gave directions as to the quantity of cargo to be sent on board, and was responsible for the stowage thereof, but it appeared that the owners were not aware of the intention so to employ the vessel until the loading had been completed. The vessel was employed on this voyage by arrangement between the Admiralty and the Minister of Munitions, the object being to supply munition makers working in America for the British Government with ore or pyrites for making munitions of war and incidentally to place the vessel where she could load sugar homeward for the Government Sugar Commission. The freight received by the Admiralty for the carriage of the ore was charged and received, because the contracts of the Government with the

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munition makers provided for, and included, a rate of freight, and were on the basis that the munition makers should be able to obtain the necessary material at a freight not exceeding the rate so provided; and that the vessel was employed with the object of supplying the materials at this rate, which was substantially lower than the current market rate at the time. The material could not have been supplied promptly, or at the contract rate of freight, by ordinary commercial tonnage. The vessel was not employed with the object of earning freight or making commercial profit. The arbitrators found that the use of the vessel was in the national interest, in a national emergency, and was a reasonable and proper measure for preserving and defending national interests, and, subject to the opinion of the Court, was a legitimate use of the vessel by the Admiralty acting for the Crown and within the powers of the Admiralty, and subject to the opinion of the Court the arbitrators were prepared to decide and award that the owners were not entitled to any extra hire payment or compensation in respect of this use of the vessel.

With regard to question B the arbitrators found as follows: In the course of the voyage the vessel encountered in the Atlantic a succession of gales and heavy weather and shipped much water on deck. During the voyage, or on survey after arrival, certain damages or defects were discovered, all on or above the upper deck. The vessel had not otherwise suffered. The owners claimed from the Admiralty in respect of that damage the sum of 1700*l.* or thereabouts as the actual or estimated cost of repairing the same. There was a question whether some part of the damage so repaired was not due to the wasted condition of some of the upper deck and its ironwork. For the purposes of this special case the arbitrators did not think it necessary to express any opinion on this point. They found as a fact that so far as the damage was not due to this wasted condition it was entirely caused by the gales and heavy weather, and that the cause was a sea risk or peril which, subject to the opinion of the Court on the question first herein submitted, the arbitrators held to

have been at the risk of the owners. The arbitrators further found as a fact that no part of the damage was caused by, or due to, any negligence or default on the part of the Admiralty as regards the cargo loaded, or the loading or stowage thereof, and that there was not in fact any negligence as alleged by the owners, and subject as aforesaid the arbitrators were prepared to decide and award that the Admiralty were not liable to the owners in respect of any part of the damage or the repair thereof.

Sir Erle Richards K.C. and *Le Quesne* for the owners. The requisition of the vessel purported to be made under the Royal Proclamation of August 3, 1914. The use of this ship for the voyage in question is not within the powers conferred on the Admiralty by the Proclamation. The scope of the Proclamation, as is plain from the preamble, is to enable the Admiralty to requisition vessels "for use as transports and as auxiliaries for the convenience of the fleet and for other similar services." It is true that the operative part of the Proclamation is absolutely unconditional, but if it be given the fullest literal meaning of which the language is capable, it would cover a requisition of the whole mercantile marine. The operative part of the Proclamation must be read in the light of the preamble and must be confined to the requisitioning of ships for the purposes expressly mentioned or for other similar services. Further, this use of the ship cannot be justified under the prerogative of the Crown. In the days before there was a standing navy there was some right on the part of the King to take ships belonging to his subjects when there was an instant and urgent necessity; but as appears from the evidence given in *China Mutual Steam Navigation Co.* v. *MacLay* (1) there is no trace in the records of the Admiralty at the Record Office "of ships being taken by compulsory powers during the American war of independence from 1775 to 1782, the war with France from 1793 to 1795 and from 1800 to 1804, and during the war with America in 1812." In view of that evidence the Crown

(1) [1918] 1 K. B. 33 ; 34 Times L. R. 81, 83.

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cannot claim to justify the use of this vessel under the prerogative. There is no special prerogative as to the taking of ships. The prerogative of the Crown only extends to a sudden emergency and during such time as the emergency exists: Chitty's Prerogatives of the Crown, p. 50.

[DARLING J. referred to *The Ship Money Case.* (1)]

There was no emergency in January, 1916, for by that time there had been ample opportunity to obtain Parliamentary powers. The arbitrators in this case have, no doubt, found as a fact that there was a national emergency in January, 1916, but it is for this Court to decide whether the class of act in question is one which can be justified under the prerogative: *The Zamora* (2); *Attorney-General* v. *De Keyser's Hotel.* (3) Further, the requisition in this case involved the requisition of the services of the master and crew, and that cannot be justified under the prerogative: *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (4)

[THE EARL OF READING C.J. That point is not raised by the special case.]

[They also contended that there was no evidence to support the findings of the arbitrators as to the acceptance of marine risks by the owners.]

Sir Ernest Pollock S.-G. and *G. W. Ricketts* for the Admiralty. It is not open to the owners to contend that the user of the ship for the voyage in question was not justified by the requisition of the ship under the Proclamation, for this was an arbitration before the Board of Arbitrators appointed to deal with claims arising in respect of ships requisitioned under the Proclamation, and if the owners contend, as they do, that this voyage was outside the Proclamation, they cannot ask the arbitrators to award them compensation for sea damage. But there is ample authority as to the validity of the Proclamation: *The Broadmayne.* (5) When once a ship has been requisitioned it may be used for all reasonable purposes connected with the war that the

(1) (1637) 3 How. St. Tr. 826.
(2) [1916] 2 A. C. 77.
(3) [1920] A. C. 508.
(4) [1918] 2 K. B. 123.
(5) [1916] P. 64.

Government may require : *Hawley* v. *Steele.* (1) With regard to the argument as to the prerogative of the Crown, it is admitted by the other side that ships can be requisitioned in a time of instant and urgent necessity. The question whether at any particular time the circumstances are such as to justify a resort to the prerogative is one to be decided by the Executive and not by this Court : *The Zamora* (2) ; *Rex* v. *Halliday* (3) ; *Lipton* v. *Ford* (4) ; but so far as this case is concerned the arbitrators have found as a fact that there was a national emergency at the time this ship was sent to Philadelphia, and, therefore, no question as to the exercise of the prerogative arises.

Sir Erle Richards K.C. replied.

THE EARL OF READING C.J. This case comes before the Court as a special case stated by arbitrators under s. 19 of the Arbitration Act, 1889, invoking the consultative jurisdiction of the Court for the purpose of obtaining our opinion upon points of law stated by the arbitrators. It is important to bear that in mind, there being no appeal from the decision of this Court, that the facts as stated are binding on the Court, if there is evidence to support them, and that we can only give a decision on the law applicable to the facts which have been found by the arbitrators. [His Lordship stated the circumstances in which the questions in dispute between the parties had arisen, and continued :] The first question dealt with in the special case, question C, in the order of the Court of Appeal is, whether the marine risks should be deemed to be borne by the Admiralty or by the owners of the vessel. Our answer to that question depends upon whether or not we think that there was evidence sufficient in law to support the arbitrators' findings of fact, that the owners agreed to bear the marine risks. [His Lordship referred to the facts set out in the case, and said :] I have come to the conclusion that there is evidence to support the finding of the arbitrators, and as soon as we have arrived at

(1) (1877) 6 Ch. D. 521.
(2) [1916] 2 A. C. 77.
(3) [1917] A. C. 260.
(4) [1917] 2 K. B. 647.

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that conclusion the function of the Court is exhausted. It is not for us to say whether upon the same materials we should have come to the same conclusion. I do not mean to throw any doubt upon the arbitrators' findings of fact. What I do mean is that it is not for us to express any opinion upon the facts, if there is evidence to support the finding.

The next question which we have to consider, question A, raises points of great public importance. It is contended on behalf of the owners that, although the vessel was properly requisitioned in January, 1916, for the use of the Government under the Proclamation of August 3, 1914, the subsequent use to which she was put by the Admiralty was improper and an unlawful exercise of their powers. Incidentally in the course of the argument it was contended that if the Proclamation were to be construed by reference only to its operative part it went too far, and that we must therefore have regard to the preamble, and that if we did so we must limit or restrict the meaning of the language used in the operative part. This point can be dealt with quite briefly, inasmuch as there is no question as to the law or canon of construction to be applied in dealing with the Proclamation, or with regulations made under it. The principle is that the preamble neither restricts nor extends the language of the operative or enacting part if that language is unambiguous. If there is ambiguity, one may refer to the preamble for the purpose of throwing light upon the intention of the Legislature, if one is construing an Act of Parliament, or of the Sovereign if it is a Proclamation. In this case I do not think that we are entitled to have any regard to the preamble. The language of the operative part of the Proclamation is not open to doubt; it is clear beyond all question, and states in simple form the power which is to be exercised. It is a Proclamation which was issued on August 3, 1914—that is, the day before war was declared. It was issued at a time when it was thought that there was imminent danger of war. It was issued in the exercise of the duty of the Crown to protect the national interests by making available the prerogative which rests in the Sovereign. The Proclamation

authorized the Lords Commissioners of the Admiralty for such period of time as might be necessary to requisition and take up for service any British ship within the British Isles or the waters adjacent thereto; and it provided that the owners should receive payment for the use and services rendered and compensation for loss and damage, and that any questions which arose should be determined by the Board of Arbitration under the Proclamation and other notifications to be issued by the Admiralty. As I have said, I find no ambiguity, and indeed it cannot be argued that there is any ambiguity, in the language itself. What is contended is that if the language is given its ordinary interpretation, the effect is so far-reaching that we ought to conclude that that cannot have been the intention. I am unable to take that view; on the contrary, I think that, reading that language as it is in the Proclamation, it was intended to give the widest possible powers in view of an imminent emergency and in view of the fact that if war was declared it was impossible to determine beforehand the ships which the Government would have to requisition from the subjects of the Crown. Consequently, in order to be prepared for that state of things, this Proclamation was issued the day before war was in fact declared, and, as the language imports, it was intended to give the fullest power to requisition British ships on payment for the use and services rendered, and on making compensation for any loss or damage.

Now, digressing for a moment from the question as to the preamble, it is contended that that power goes beyond the right which is vested in the Sovereign. I do not agree. No authority has been cited which would lead me to the conclusion that the Crown has not power to issue a Proclamation in these terms. The Proclamation was issued in the national interests to protect the Realm and the subjects of the Realm, and I can find no authority for construing it in the limited way contended for. Reference has been made to the following passage in Chitty's Prerogatives of the Crown, at p. 50: "What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and

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by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations." Those words were apparently spoken by Lord Erskine, in a speech in Parliament with reference to the Orders in Council. It is to be observed that it is not a judicial pronouncement, but it is quoted by the learned author as a correct statement of the law. Be that as it may, there is nothing in that statement which would lead us to the conclusion in this case that this exercise of the prerogative exceeded the powers of the Crown. The argument is that the avowed cause must be an emergency and that the act done is merely temporary, and it is suggested that it is only where there is what was called "instant and urgent necessity," that is to say, a then existing urgent necessity, that the prerogative can be invoked. That does not mean that to justify the use of the prerogative you must be able to show that at the precise moment there is such a state of things existing that unless the prerogative is invoked the nation will succumb. That is far too limited a meaning. What, I think, it means is that there must be a national emergency, an urgent necessity for taking extreme steps for the protection of the Realm. In this case, there is a finding by the arbitrators that there was a national emergency; but even if there were not that finding, it cannot be doubted that there was a national emergency in January, 1916, and later on when the events in question happened. If there was a national emergency, there was power not only to issue the Proclamation, but to put it into operation. It is not indeed contended that there was not power to issue it on August 3, 1914. What is said is that by January, 1916, there had been ample time to obtain Parliamentary powers. That is not a sufficient answer. Parliament could of course give powers in a national emergency, but Parliament may have

thought that the necessary powers already existed under the Proclamation. The fact is that in January, 1916, there was an urgent necessity in the sense of a national emergency then existing, and therefore in my opinion there was power to act upon the Proclamation at that time and at the later dates in question.

As in my opinion the language of the operative part of the Proclamation is perfectly clear, no question can arise with regard to the preamble. I would only observe that even if the language of the preamble could be taken into consideration, I am far from satisfied that this exercise of the prerogative could not be justified, but I do not decide this case on that ground. Question A in the case is a question which involves other considerations. I have already dealt with the contention that the Admiralty were not entitled to requisition the vessel in January, 1916, because there was no urgent necessity at that date. Then it was said that there was no power to requisition, because the ship was not required in January, 1916, for transport purposes or as an auxiliary of the fleet or in other similar circumstances. That point depends on the preamble, and, as I have already said, the preamble does not apply.

The Admiralty, therefore, had the power to requisition the ship, and they did in fact requisition her, and the really substantial point in the case is this: was there power to send this requisitioned ship on this particular voyage from Huelva to Philadelphia? I have come to the conclusion on the facts found in the case that the use of the vessel for the voyage from Huelva was not in the circumstances an improper use or an unlawful exercise of the powers given by the Proclamation. It is in my opinion sufficient to say that as munitions were urgently required and could in part only be obtained from munition makers in America, and they could not supply them unless this ship was sent there with a cargo of ore and pyrites, it seems to me to follow that the ship was used by the Government for the purpose of obtaining munitions at a time of national emergency, when munitions were vitally necessary in the interests of the Realm. I

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therefore come to the conclusion that the Admiralty had the right to employ the ship on the voyage from Huelva to Philadelphia with a cargo of ore. That really disposes of question A, for I do not think it is material to decide whether the owners were entitled to receive any additional hire or compensation above the monthly hire. When once the conclusion is arrived at that the Admiralty had the right to employ the vessel at that time, it was not an improper use of her to send her on the voyage from Huelva to Philadelphia, and as a matter of law, therefore, the contention of the owners fails. The mere fact that freight was payable to the Admiralty does not affect the question if, as I hold, the requisition was proper.

That leaves only question B, which is really answered by what I have said as to questions A and C. Having come to the conclusion that there was evidence on which the arbitrators could find an agreement by the owners to bear the sea risks, and that the Admiralty were making a proper use of the requisitioned vessel in sending her on this voyage, it follows that the Admiralty are not liable to compensate the owners for the cost of repairing the damage, inasmuch as that is damage done by perils of the sea which the owners have agreed to bear themselves.

DARLING J. I am of the same opinion. My Lord has dealt carefully and fully with each of the questions upon which the arbitrators desired to consult the Court, and I desire to say a word on one point only, and that is upon the larger question raised not so much by the arbitrators as by Sir Erle Richards in his argument that the prerogative of the Crown has been exceeded and that the sending of the ship from Huelva in Spain to Philadelphia in America could not be justified under the prerogative. The answer to that contention does not depend merely on the Proclamation; it depends upon the common law and the constitutional law of England. The rule undoubtedly is that the King, acting in regard to what is called prerogative "regale et legale," has the right on behalf of his subjects to take their property for

the defence of the Realm and to protect the interests of the subjects, compensation of course being fairly made. Nowadays compensation is made by reason of exact provisions, but it ought always to be made, because what is taken for the general good should be paid for by the general community. It seems to me that in this case there has been no stretching of the prerogative. It is a very difficult matter for us to judge. Cases have been cited by the Solicitor-General which show that it is not the business of this Court to look carefully into all the military necessities, to consider whether this manœuvre or that should be performed, or whether the country should be defended by ships or by bayonets. That must be left, and there is ample authority for saying so, to the Executive, and this Court cannot profess to interfere with the discretion of the military authorities and say that they ought not to have taken this ship and sent her to Philadelphia with iron ore for making munitions of war, but that they should have defended the country in some totally different manner. We do not, and cannot, know what were the necessities of the time; that matter must be left to the Executive as was said in several cases which have been cited. It was said by Sir Erle Richards with some insistence that there must be an instant and urgent necessity and that there was none here, and that we ought to look very carefully and meticulously to see whether the use of this particular ship was required. Of course it is possible that the war could have been carried to a successful conclusion, even if this ship had not been sent to Philadelphia, but it is not necessary for us to consider that. I find that in the case of *John Hampden* (1) many wise things were said by the judges which are applicable to the state of things which existed during the late war. I will quote from the argument of Sir Edward Crawley, one of the judges of the Court of Common Pleas, in the Exchequer Chamber. Although his judgment concerning ship-money cannot be sustained—since it was reversed by the

(1) 3 How. St. Tr. 826. [Crawley's name, according to Dugdale's Chronica Series and Foss, was not Edward but Francis. As to his quotation see the note at the end of this report.]

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battle of Naseby—yet what he says here is I think still good. He said (1): "The moralists do make three parts of Providence: 1. 'Memoria præteritorum.' 2. 'Perspicientia præsentium.' And 3. 'Providentia futurorum.' It much concerns the King, the head of the commonwealth, to be circumspect in the prevention of public danger; conjectures and probabilities are to be regarded. Now, put the case upon a probable and violent presumption; a potent enemy is prepared and ready to come. Is it not fit there should be a defence prepared instantly?" "Providence" there means providing for the defence, and he goes on to prove that you cannot know what your enemy is going to do, and you cannot tell what your own people are going to do, for if you do you tell the enemy, and what was true in the time of Charles I. is even more likely to happen in the days in which we live. Sir Edward Crawley then quotes a very judicious writer: "Comines, fol. 179 saith: 'That if the cloud be seen but afar off, the King, without the consent of the subjects, cannot tax them; but if the cloud be overhead, the King may call certain wise persons to him, and tax his subjects.'" Then Sir Edward Crawley goes on to say: "You say, that if the King doth move a war offensive, there's time enough to call a parliament; if defensive, the cloud is seen long before. But, oh, good sir, is this always true? Is not the cloud sometimes even over the head, before descried? If you read Comines he will tell you, that in times of peace we ought to fortify." In time of peace Parliament must itself provide.

On August 3, 1914, there was a national emergency and a few hours later active War had begun. It had been long in progress when the Government requisitioned the *Crown of Leon*. They did not wait until there was not a shell left before sending this ship from Huelva to Philadelphia. It is said that in doing so they strained the prerogative. It seems to me that it cannot be contended, and if it were it would hardly be for this Court to judge, that in doing this they stretched the prerogative so as to exercise it illegally.

(1) 3 How. St. Tr. 1083.

I only desired to say a word upon this question, because some people have an impression that to use the prerogative of the Crown even for the purpose of the defence of the King's subjects is to do something which ought not to be done. It seems to me that what was done in this case was done necessarily and properly.

SALTER J. I am of the same opinion. I only desire to add a word with reference to question A on which I think this matter mainly turns. As the original requisition by the Crown of the subject's chattels in an emergency must be justified by the emergency, so the use which the Crown makes of the subject's chattels during the requisition must always be justified by showing a state of public danger and emergency. But no one can doubt that the Crown has the right to use the requisitioned goods of the subject in any manner which a grave national emergency may make necessary. I cannot doubt that these powers were fully delegated to the Admiralty by the Proclamation.

The arbitrators in this case have found, in effect, that at a time which to the common knowledge of us all was a time of grave national peril, the Government had a contract for the supply of munitions from persons in the United States, and by sending this ship on this voyage they were able to supply those persons with materials for making munitions more promptly than could otherwise be done. The obvious and necessary result would be that they would get munitions in this country, or at the seat of war, more promptly than would otherwise have been the case. The arbitrators have found these facts, and have found that this vessel was not sent on this voyage with any object of earning freight, and they express their conclusions of fact in the following words: "The arbitrators find that the said use of the vessel was in the national interest, in a national emergency, and was a reasonable and proper measure for preserving and defending national interests." That is a finding of instant and urgent necessity; it is a finding of fact; and I think there was evidence on which the arbitrators could so find.

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In this case it is unnecessary to consider whether, or in what circumstances, the Court should accept the opinions of the responsible officers of the Crown, as stated by them or as shown by their acts, as conclusive evidence of emergency. That their opinions would always be cogent evidence goes without saying.

On the facts to which I have referred I think that question A should be answered in the affirmative, that by virtue of the delegation of authority which was notified by the Proclamation, the Admiralty had the right to send this ship on this voyage. I am referring only to the first part of the question, that is to say, that the Admiralty had the right, and I think we might fairly add, under His Majesty's Proclamation, to employ the vessel on the voyage in question.

Solicitors for the owners : *Botterell & Roche.*
Solicitor for the Admiralty : *Treasury Solicitor.*

F. O. R.

NOTE.—The very same passage of Comines cited by Crawley J. in the case of Ship-money was cited by Croke in his contrary opinion, 3 St. Tr. 1159. Both of them used Danett's translation of Comines (1596 ; the page reference given is correct for the second edition, 1614). Neither of the quotations is verbally exact ; Croke's is fuller and reads "That cloud is seen afar off, before that the tempest falls, especially by a foreign war" : a material qualification which Crawley omitted. The place in Comines is Bk. V., ch. 19, as numbered in ed. Mandrot, 1901 ; it may be for the learned reader's convenience to give a rather closer version of it with part of the context. "Now to proceed with this matter, is there a king or prince on earth who hath power (beyond his demesne) to lay one penny on his subjects without the grant and assent of those who shall pay it, unless by tyrannous force ?" As to the question of emergency : "In matters of enterprise there is no such haste, there is time enough ; I tell you kings and princes are of far greater strength against their enemies when they enterprise with their subjects agreeing. In case of defence, the attack is seen coming far off [*ceste mute*—of wider sense than mod. Fr. *meute*—ed. Mandrot ; *nue* or *nuée* former edd. whence Danett's version], specially when it is of foreigners." However sudden the occasion, certain notables may be summoned so that the necessity may be on record. There must be no little wars made without grave cause as a pretext for raising money. The paragraph concludes with high praise of the management of public affairs in England.—F. P.

READ *v.* GOATER AND ANOTHER.

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Dec. 7.

Landlord and Tenant—Dwelling House Let with Business Premises—Recovery of Possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12, 13.

By s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed . . . . (*c*) . . . . 78*l.* . . . . Provided that . . . . (iii.) for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

Sect. 13, sub-s. 1: "This Act shall apply to any premises used for business trade or professional purposes . . . . as it applies to a dwelling house, and as though references to 'dwelling house,' 'house,' and 'dwelling' included references to any such premises. . . . ."

The plaintiff claimed to recover possession of a dwelling house of the rateable value of 7*l.* and of a stableyard, coach-house, etc., of the rateable value of 48*l.* The house and stableyard, etc., were let together to the defendants under one agreement at a monthly rent of 6*l.* 13*s.* 4*d.* The stableyard, coach-house, etc., were occupied by the defendants in their business as livery stable keepers. The county court judge held that as the stableyard, coach-house, etc., if let separately, would be of a rateable value greater than one-quarter of the rateable value of the house, the letting was by s. 12, sub-s. 2 (iii.), excluded from the operation of the Act. The defendants appealed:—

Held, allowing the appeal, that s. 12, sub-s. 2 (iii.), deals only with the case of a single letting of a dwelling house that is protected by the Act with land or premises that are not protected; it has no application to a single letting of a protected dwelling house and business premises which are protected by s. 13.

APPEAL from Newport and Ryde County Court.

The plaintiff was the landlord of a house in Newport, and, contiguous thereto, of a stableyard, coach-house, etc., all of which were let in one letting to the defendants as monthly tenants at a rental of 6*l.* 13*s.* 4*d.* per calendar month. The stableyard, coach-house, etc., were occupied by the defendants in their business as livery stable keepers. The premises comprised in the letting were separately assessed; the rateable value of the house being 7*l.*, and that of the stableyard, etc., 48*l.* The tenancy was duly determined

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by notice to quit which expired on July 29, 1920, and as the defendants did not give up the premises on that date, the plaintiff sued to recover possession. The defendants claimed the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The county court judge gave judgment for the plaintiff. In his notes he said: "It is in my opinion plain (1.) that the house in question is let together with land other than the site of the house; (2.) that such land, if let separately, would be of a rateable value greater than one-quarter of the rateable value of the house; and (3.) that therefore the house is by s. 12, sub-s. 2 (iii.), excluded from the operation of the Act."

The defendants appealed.

H. H. Joy for the defendants. The county court judge has either overlooked or has given no effect to s. 13 of the Act which protects business premises. That section has to be read in conjunction with s. 12, sub-s. 2 (iii.); clause (iii.) should therefore be construed as if it read "for the purposes of this Act, any land or premises, other than business premises, let together with land shall," etc. In this case the house and business premises if let separately would be protected; and it would be a strange result if when let together they are not protected.

W. F. Waite (*Barrington-Ward K.C.* with him) for the plaintiff. The county court judge was right. Sect. 12, sub-s. 2 (iii.), is the only provision of the Act which applies to a tenancy of a house let with other premises. The clause is perfectly clear in its terms, and unless the tenant can bring himself within those terms he is not entitled to protection. Sect. 13 deals with premises let by themselves and therefore has no application in the present case.

LUSH J. This is a puzzling case, but, with the greatest respect, I cannot agree with the view taken by the county court judge.

The plaintiff let to the defendants a house with some

business premises, the rateable value of the house being trifling as compared with the rateable value of the business premises. The question is, are the house and the business premises, let together, protected by s. 12 or s. 13 of the Act of 1920? No doubt if each stood alone each would be protected; the house would be protected by the earlier part of s. 12, and the business premises by s. 13. Therefore each of the component parts of this composite letting would be protected. It has been contended for the plaintiff, and the county court judge accepted the argument, that being let together they are not protected. It is said that as the house is let together with land other than the site of the house, and having regard to the rateable values, s. 12, sub-s. 2 (iii.), provides that the Act shall not apply. Sect. 12, sub-s. 2 (iii.), was obviously intended to deal only with the case of a protected house being let with unprotected land or premises, and it provides that if the rateable value of the land or premises compared with that of the house is less than one-quarter of the rateable value of the house, the whole is to be treated as one house. If we turn to s. 13 we find that business premises are no longer unprotected land or premises. It provides that references in the Act to a house shall include references to business premises, and therefore the only reasonable construction to put upon s. 12, sub-s. 2 (iii.), is that which I have indicated. Inasmuch as the house is protected by s. 12 and the business premises by s. 13 the two let together in one letting are protected. The county court judge was therefore in my opinion wrong in holding that the Act does not apply.

McCARDIE J. This action was brought by the plaintiff to recover possession of premises—a house of the rateable value of 7*l.*, and certain stabling, contiguous to the house, of the rateable value of 48*l.* Those buildings, the house and stabling, could usefully be let together, and they were so let by the plaintiff to the defendants at a single rent. The whole premises, taken together, are clearly within the limits indicated by s. 12 of the Act. The county court judge gave judgment

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for the plaintiff on the ground that the Act does not apply. The Act of 1920 is an Act which not only consolidates but amends and enlarges the Acts theretofore existing. It was intended to give far wider protection than was previously given to small tenants in the country, and the scheme of the Act is that s. 5 gives a protective possession to the tenants of the classes within the Act subject to certain conditions indicated. Sect. 12, sub-s. 2 (iii.), contains the provision relied upon by Mr. Waite for the plaintiff, as showing that the present defendants are disabled from invoking the protection of the Act. The main object of sub-s. 2 (iii.) of s. 12 is to deal with agricultural holdings and to prevent a farmer who possesses on the one hand a dwelling house and on the other hand a large acreage from keeping possession of the dwelling house, although he might be bound to give up the land. In the majority of agricultural holdings the possession of the dwelling house and farm buildings is essential to the proper working of the holding; but undoubtedly clause (iii.) may go beyond agricultural holdings. In this case it was said on behalf of the plaintiff that, inasmuch as the rateable value of the stabling accommodation largely exceeded that of the dwelling house, the whole holding was outside the purview of the Act. So far as I can see the county court judge never referred to s. 13—a section of vital importance, making a revolutionary enlargement of the legislation on this subject. Two classes of tenancies are protected; on the one hand dwelling houses and on the other hand business premises. The county court judge has held that although each branch of this holding might fall within the Act, yet together it does not come within the Act. I do not think he was justified in ignoring s. 13. In my opinion s. 12, sub-s. 2 (iii.), can be reconciled with s. 13, by incorporating clause (iii.) with s. 13. That must be done if the Act is to be applied in a practical manner. Sect. 12, sub-s. 2, clause (iii.), must be construed as if it read thus: "For the purposes of this Act any land or premises, not being business premises protected by s. 13, let together with a house shall, if the rateable value of the land or premises let separately would be less than one-

quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house." If s. 13 is incorporated with clause (iii.) there is no difficulty. In my view these premises are clearly protected, and I cannot imagine how any workable construction of the Act should lead to such a result as that appearing in the county court in this case. This Act has not been drawn with artistic care, but the Court must not give an interpretation of it based upon extreme niceties of construction. It is essential that, wherever possible, it should be construed in a broad, practical, common-sense manner so as to effect the intention of the Legislature. If we were to hold against the defendants, it seems to me that there would be throughout the country a vast number of tenants possessing on the one hand a small house and on the other hand contiguous but separate business premises in the same letting who would be entirely excluded from the protection of the Act if the view of the county court judge were sound. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *W. J. Lake & Son, for Roach, Pittis & Co., Newport, Isle of Wight.*

Solicitors for defendants: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

J. S. H.

C. A. [IN THE COURT OF APPEAL.]

1920

Nov. 10, 11. SIMMONDS *v.* NEWPORT ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

[1920. S. 2587.]

Mine—Coal Mine—Wages—Detailed Particulars of Amount—Collier's Boy—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 96, *sub-ss.* 2, 3.

Sect. 96, sub-s. 2, of the Coal Mines Act, 1911, provides that "the wages of all persons employed in or about any mine shall be paid weekly, if a majority of such persons so desire, and there shall be delivered to each such person a statement containing detailed particulars of how the amount paid to him is arrived at."

By sub-s. 3: "Every person who contravenes or fails to comply with or permits any person to contravene or fail to comply with this section shall be guilty of an offence against this Act; and, in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance":—

Held, that sub-s. 2 imposed upon the mineowners a duty to deliver a statement with the detailed particulars therein prescribed to a boy employed in the mine who works under, and whose wages are handed to him by, a collier known as a butty who has received the amount from the mineowners.

Held, further, that this duty can be enforced not only by proceedings before justices under sub-s. 3, but by an action for a declaration at the instance of a boy so employed to whom such a statement as aforesaid has been refused by the mineowners.

Judgment of Bray J. [1920] 3 K. B. 131 affirmed.

Appeal from the judgment of Bray J. in an action tried before the learned judge without a jury. (1)

The plaintiff claimed a declaration that he being a person employed by the defendants in or about their mine and entitled to be paid wages weekly was, by virtue of s. 96, sub-s. 2, of the Coal Mines Act, 1911, entitled to have delivered to him weekly by the defendants while he was employed by them a statement containing detailed particulars of how the amount paid to him weekly as wages was arrived at, and that the

(1) [1920] 3 K. B. 131.

defendants were under a statutory duty to deliver that statement to him.

The defendants refused to deliver any statement to the plaintiff, insisting that in the circumstances he was not entitled to receive one.

The plaintiff was a collier's boy working in the defendants' colliery under a man employed by the defendants to cut coal commonly known as a butty. The plaintiff was seventeen years old, and had worked in the colliery ever since he was fourteen. He had then gone to the manager's office at the defendants' colliery with a man named David Beech, who was to be his butty. He told the manager that he wanted to start with Beech. The manager told him he might start the next day, and he was required to sign a book called the contract book, and this he did. Nothing was said about wages, but the plaintiff knew that the wages would be the minimum wages then prevailing. These wages were paid weekly at so much a day according to the age of the boy, with three additions, one called the percentage, depending on the price of coal, another called the war wage, and a third, a sum of 2*s*., under Sankey J.'s award. The wages were subject to certain deductions for doctor, health insurance, etc. Butties did not always insist upon the deductions and occasionally made the boys presents, as an encouragement to work, but these were not paid as wages. After a time Beech fell ill and ceased working, and the plaintiff was then sent to work with David Lewis by the official who had charge of that district in the mine. After some months, Lewis was called up for the army and the plaintiff was then sent by the official to work with Daniel Harris. There was no agreement between the plaintiff and Daniel Harris, his butty at the time this action was commenced, to pay him anything more than the minimum wage with the three additions. During this time he was occasionally taken away for short times, with Harris' consent, to work for the defendants elsewhere on other work, such as light carrying, etc., and sometimes he was sent to work under other butties.

During the whole of the time, the plaintiff was paid his

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wages by the butty under whom he worked, and this was so even when he had worked for the colliery. He knew what he was entitled to, and his wages rose as he got older. All this was according to the usual practice at the colliery. The butty had no right to dismiss him. He could complain to the manager, and the manager in such a case would find the boy work with another butty, or could give him fourteen days' notice to leave the colliery. The butty received a weekly statement from the defendants showing the wages due to him, but not showing the wages due to the plaintiff except when the plaintiff had been working for the defendants, or when the butty was on day work. The butty paid the plaintiff out of the money he received from the defendants.

The defendants kept a book called a time book in which appeared the names of the workmen employed, including the names of the butties and the boys who worked under them. The book, which was put in evidence, showed the names of Daniel Harris and of the plaintiff and the number of days the plaintiff worked and his wages. It contained all the materials for determining what the plaintiff was entitled to every week. It was kept by the fireman who obtained from the butty the rate of wages paid to the boy by the butty every month. No record was kept of any presents made to the boy by the butty. The contract book signed by the plaintiff was a copy of the Conciliation Board Agreement. It purported to be a contract between the plaintiff and the defendants and it was signed by the defendants as well as by the plaintiff. The under-manager was the only man who could sign a boy on. The Conciliation Board Agreement, by clause 32 directs that every person employed must sign this book.

The defendants called the manager. He said: "My position is that if a boy is a collier's boy (as the plaintiff was) he is not entitled to a ticket at all from me or the butty. That is my defence to this action." By "ticket" he meant the weekly statement delivered to the butty every week. It showed the detailed particulars of how the amount due to

the butty was made up and, as between the defendants and the butty, it complied with the sub-section.

Bray J. gave judgment for the plaintiff.

The defendants appealed.

Compston K.C. and *Harold Morris* for the appellants. The judgment of Bray J. ought to be reversed for the following reasons :—

1. The Court has no jurisdiction to make the declaration claimed, because by s. 96, sub-s. 3, failure to comply with the requirements of the section is made an offence against the Act punishable by s. 103 in a Court of summary jurisdiction : *Institute of Patent Agents* v. *Lockwood* (1) ; *Barraclough* v. *Brown*. (2) In *Dyson* v. *Attorney-General* (3) the High Court had jurisdiction over the matter in dispute. In *Barwick* v. *South Eastern and Chatham Ry. Coys.* (4) the Court in making a declaration was not exercising a jurisdiction conferred as in this case exclusively on the inferior Court. The words of Order XXV., r. 5, are wide, and enable the Court to " make binding declarations of right whether any consequential relief is or could be claimed, or not," and in *Guaranty Trust Co. of New York* v. *Hannay* (5) Pickford L.J. said : " The effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration." But in *Thomas* v. *Moore* (6) the same learned judge gave a more restricted interpretation to the rule. He said : " I have never heard of a declaration that a defendant is doing wrong, unless perhaps it is followed by a statement that damage has accrued or is likely to accrue, and that the defendant threatens to continue his wrongful act against the plaintiff." No damage has accrued or is likely to accrue to the respondent in this case. He knows the amount of wages he is entitled to, and a detailed statement made out by the appellants would really be of no use to him. If it

(1) [1894] A. C. 347.
(2) [1897] A. C. 615.
(3) [1911] 1 K. B. 410.
(4) Ante, p. 187.
(5) [1915] 2 K. B. 536, 562.
(6) [1918] 1 K. B. 555, 567.

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were withheld he could not maintain an action. If that be so, then

2. Even if the respondent were entitled to have a statement, the Court would not make a declaration of his right: *Offin* v. *Rochford Rural Council* (1); *Earl of Dysart* v. *Hammerton* (2); *Hammerton* v. *Earl of Dysart*. (3)

[BANKES L.J. referred to the declaration in *Dyson* v. *Attorney-General*. (4)]

Sect. 96, sub-s. 2, of the Act of 1911 does not say by whom the detailed statement is to be made out. The method provided by the Legislature for fixing liability upon the person in default is by summary proceedings. The Court, if it has jurisdiction to make the declaration claimed, ought, in the words of Stirling J. in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (5) "to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances." But the case may be put higher than that.

3. The person to deliver the statement is the butty and not the appellant company. The Act recognizes an ultimate and an immediate employer—s. 94. The butty-man is the immediate employer. He pays the boy his wages. He has, while the company has not, the means of knowing what is due to the boy, and, where no one is specified as the person to deliver the detailed statement, the inference is that he who pays the wages should deliver the statement. The purpose of this declaration is to tie the hands of the Court of summary jurisdiction when proceedings are taken against the appellants under ss. 99, sub-s. 3, 101, sub-s. 1, and 103, sub-s. 1. But for this declaration the appellants might show that they had taken reasonable means to prevent the withholding of the statement, and that would exculpate them; but it will not avail them if this declaration stands, because their liability is already determined thereby.

4. The appellants do regularly deliver to the butty a detailed

(1) [1906] 1 Ch. 342.
(2) [1914] 1 Ch. 822.
(3) [1916] 1 A. C. 57.
(4) [1912] 1 Ch. 158, 160.
(5) [1898] 2 Ch. 331, 345, 346.

statement of the wages due and paid to him. His is the hand to pay the respondent. Therefore delivery of the statement to the butty is a compliance with s. 96, sub-s. 2.

Disturnal K.C. and *Lincoln Reed* for the respondent. Bray J. has found, and no other finding would have been consistent with the evidence and with *Hooley* v. *Butterley Co.* (1) and *Churm* v. *Dalton Main Collieries* (2), that the respondent was employed by the appellants. Then he is entitled to have delivered to him a detailed statement. This right having been conferred on a particular class of persons, to withhold it is to commit an actionable wrong: *Groves* v. *Lord Wimborne* (3); and none the less so because the default is also punishable summarily. Then who are the persons to deliver the statement? Plainly the employers. This is not disputed. Assuming that the appellants are the employers, they are liable in an action on the case if they withhold the statement. It is idle to say the statement is of no use to the boy. The evidence shows that he may be sent from one butty to another or set to work directly under the company. If he were injured in the course of his employment a detailed statement of his wages would be of the greatest value as evidence of his weekly earnings.

[They were stopped.]

Compston K.C. in reply.

BANKES L.J. In my opinion the judgment of Bray J. was clearly right. The question raised is as to the position of a boy who was working under a butty in the appellants' colliery. The boy brought the action for a declaration that by virtue of s. 96, sub-s. 2, of the Coal Mines Act, 1911, he is a person entitled to have delivered to him weekly by the defendants a statement containing detailed particulars of how the amount paid to him weekly as wages is arrived at. The appellants raised several objections to the maintenance of the action, but in this Court they are confined to four: First, as to the jurisdiction of the Court to entertain the action at all;

(1) [1916] 2 A. C. 63. (2) [1916] 1 A. C. 612.
(3) [1898] 2 Q. B. 402.

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secondly, as to whether, if it has jurisdiction, the Court should exercise its discretion in favour of the respondent; thirdly, a question partly of fact and partly of law, whether the appellants are the persons aimed at by s. 96, sub-s. 2, as the persons to deliver the statement; and, fourthly, whether the statement delivered to the butty was or was not a sufficient compliance with the statute. The relations between a colliery company, a butty, and a boy or man employed as a butty's help, are somewhat complicated; but when the facts are ascertained it is clear that the relationship of master and servant exists between the company and the boy. The butty is introduced for the sake of convenience, not as a concurrent employer, but merely as an agent of the company with a limited discretion vested in him as to the particular person to be employed as his boy. The history of the case begins with the boy entering into a contract of employment with the appellants which is to be found in the colliery contract book provided for recording the terms of engagement between the appellants and each person signing the book. That is enough, in the absence of indications to the contrary, to constitute the relationship of employers and employed between the appellants and the respondent. But the matter does not rest there. The House of Lords decided in *Hooley* v. *Butterley Co.* (1) that a person employed on terms which cannot be distinguished in principle from those of the respondent's employment was employed by the company and entitled to be paid by the company a minimum wage under s. 1 of the Coal Mines (Minimum Wage) Act, 1912. Further, the evidence in this case shows that no one can discharge the respondent except the appellants. The butty-man may say he does not wish to employ the respondent any longer, and the result may be that the boy may cease to work under that particular butty-man; but that does not result in his leaving the appellants' employment. They and not the butty-man have and can exercise the right to dismiss the boy from their employment. In the pay sheet deductions are specified in respect of moneys which can only be deducted from the boy's wages by the

(1) [1916] 2 A. C. 63.

appellants. The amount, if any, to be deducted is inserted in the butty-man's pay sheet. The position of the butty-man is this: he is given by the practice of the colliery, and allowed by the appellants, a discretion as to who shall be employed to work under him as his boy; this is for convenience and to facilitate the working of the colliery. His is the hand to pay the boy the wages due to him from the appellants. Sometimes he makes presents to the boy, either to encourage him to work or to reward him for working; but the presents do not form any part of the boy's wages.

I come now to the words of the statute. It is of very little use to discuss the point whether the delivery of this statement is likely to be of any benefit to the boy. If the statute has placed an undue burden on the employers, that is a matter for the Legislature. We have only to interpret its language, and its language is reasonably clear. It provides that "the wages of all persons employed in or about any mine shall be paid weekly." It is true it does not say by whom, but in the absence of any express provision the necessary inference is that the person intended is the person liable to pay the wages and not the person by whose hand the payment is made. The section continues "and there shall be delivered to each such person a statement containing detailed particulars of how the amount paid to him is arrived at." Again, the person to deliver the statement is not specified; but prima facie it is the person referred to earlier in the section, particularly as the person liable to pay the wages is in the best position to know the detailed particulars of how the amount paid is arrived at. Therefore on the true construction of the section I think the person liable to make the weekly payment is the person to deliver the statement. It is said that in certain cases the colliery company may not be in the best position to know; where for example the men work and are paid in gangs. When that case arises it may be necessary to consider whether the Legislature has imposed the duty of delivering particulars upon a person who has no means of knowing what they are. That is not the position of the appellants. They have all the necessary information;

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they pay the wages and they are the persons to deliver the statement.

I take the fourth point next; I only mention it to say that no argument was adduced in support of it, and that I can see no ground for suggesting that by delivering a statement to the butty-man the appellants comply with a statute which says that a statement shall be delivered "to each such person"—i.e., each person employed in or about the mine and paid as therein mentioned.

As to the jurisdiction of the Court to make the declaration, I point out that this sub-section is an instance of legislation which is passed not for the public protection, but for the benefit of individuals. It is stated in Maxwell on the Interpretation of Statutes (1) that "when a statute imposes a ministerial, as distinguished from a judicial, duty, for the benefit of particular individuals, any of these, if directly injured by the breach of the duty, has impliedly a right to recover, from the person on whom the duty is cast, satisfaction for the injury done to him contrary to the statute, unless, of course, a different intention is to be collected from the Act." It is said that a different intention is to be collected from this Act, because it provides the remedy to which the plaintiff is entitled for breach of the duty. I cannot agree with this contention. I would refer to the words of Lord Campbell C.J. in *Couch* v. *Steel* (2) which distinguish this case from the kind of case to which the appellants would liken it. That was a case where a statute had imposed upon shipowners the duty of having and keeping on board their vessels a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages. For every default in this duty the shipowner incurred a penalty. Lord Campbell C.J. said: "The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the *public* wrong is concerned, there is no remedy

(1) 5th Ed. (1912) 659; 6th Ed. (1920) 715.

(2) (1854) 3 E. & B. 402, 412; 23 L. J. (Q. B.) 121, 125.

but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable: and the question is, whether the penalty annexed to the offence concludes (1) the plaintiff who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong; but, by the penalty given by the Act now in question (stat. 7 & 8 Vict. c. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty." The only so-called remedy provided for breach of s. 96, sub-s. 2, of the Act of 1911 is a fine, no portion of which is payable to the plaintiff; it is purely in the nature of a penalty and affords no remedy to the plaintiff for the wrong of which he complains. Much reliance was placed on *Barraclough* v. *Brown* (2) and *Institute of Patent Agents* v. *Lockwood.* (3) In *Barraclough* v. *Brown* (2) an infringement of the statutory duty involved a penalty; but the penalty was a sum of money recoverable by the person complaining, though recoverable only in a Court of summary jurisdiction. In the *Patent Agents' Case* (3) there was no

(1) The report in the Law Journal has "includes."

(2) [1897] A. C. 615.

(3) [1894] A. C. 347.

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statute passed for the purpose of benefiting any particular class of persons. The statutory rule was passed because the Board of Trade thought it expedient that no one should practise as a patent agent without being registered as a patent agent in pursuance of the Patents, Designs and Trade Marks Act, 1888. In the words of Lord Herschell L.C. (1): "You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. . . . . The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of 20*l.*" There was no other remedy. There was no individual who could complain of a breach of a statutory duty towards him either individually or as one of a particular class. Those two cases are clearly distinguishable from this case.

Then Mr. Compston contended that there was no jurisdiction under Order XXV., r. 5, to make the declaration claimed because, as he said, the Court cannot grant relief in the matter in dispute between the parties. The words of the rule are: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." I do not follow the argument that the Court cannot grant relief in the matter in dispute, unless it means that the appellants do not propose to act upon any declaration made in favour of the respondent; but surely a declaration by the High Court of Justice of a plaintiff's rights in a dispute between him and his employer is of itself a granting of relief at least as great as a conviction of the employer in a Court of summary jurisdiction. With regard to the jurisdiction of the High Court, in *Guaranty Trust Co. of New York* v. *Hannay* (2) there is a passage in the judgment of the present Master of the Rolls, then Pickford L.J., which has already been referred to. There is also a passage in my judgment which seems appropriate and I therefore repeat it. After saying that in my opinion it is open to the Court to grant a

(1) [1894] A. C. 361. (2) [1915] 2 K. B. 536.

declaration in any case in which the person claiming the declaration can be said to be seeking relief, I went on (1) :— "What is meant by this word 'relief'? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible." It is said that in *Thomas* v. *Moore* (2), Pickford L.J. went back from what he had said in the former case. In *Thomas* v. *Moore* (2) he said : "I have never heard of a declaration that a defendant is doing wrong, unless perhaps it is followed by a statement that damage has accrued or is likely to accrue, and that the defendant threatens to continue his wrongful act against the plaintiff." Those words were very applicable to the facts in that case, but the Lord Justice did not intend to go back from anything that had been said in *Guaranty Trust Co. of New York* v. *Hannay* (3), a case which has been lately approved in this Court in *Barwick* v. *South Eastern & Chatham Railway Cos.* (4) In my opinion the Court has jurisdiction to make the declaration, and Bray J. exercised a wise discretion in granting it. Mr. Morris argued that the effect of the declaration will be to prejudice the appellants' position if summoned before a Court of summary jurisdiction for an offence under s. 96, sub-s. 3. I do not assent to that argument. Their position under s. 96, sub-s. 3, seems to me to be unaffected by the fact that this Court has placed a construction on the

(1) [1915] 2 K. B. 572.
(2) [1918] 1 K. B. 555, 567.
(3) [1915] 2 K. B. 536.
(4) [1921] Ante, p. 187.

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statute and declared that, as between the appellants and the respondent, the appellants are the persons to deliver a detailed statement under sub-s. 2. The appeal must be dismissed.

SCRUTTON L.J. I agree.

ATKIN L.J. I agree. The principal question, who is the person on whom the obligation to pay the wages is placed by s. 96, sub-s. 1, is concluded by *Churm* v. *Dalton Main Collieries* (1) and *Hooley* v. *Butterley Co.* (2), when the evidence in this case is considered. One piece of evidence it is important to bear in mind. Harris, the butty, was asked in cross-examination: "When the collier has the proper amount from the colliery office he pays the boy?" He answered: "Yes, according to his age." He was asked: "The collier will not pay him until he has first made sure that the proper war wage and percentage have been credited him?" He answered: "Yes." This case differs in one important particular from *Richards* v. *Wrexham Collieries.* (3) There the collier paid the boy whatever happened and took the risk of getting what he paid from the company. I mention this in addition to the fact that the decision in that case has been disapproved in the House of Lords.

There are two passages to which I think I ought to refer. In *Churm* v. *Dalton Main Collieries* (4) Lord Atkinson states the facts on which he decided in favour of the appellant. "It is not disputed in this case," he said, "that in this colliery the respondents hired the filler, and that they, and only they, had the power to dismiss him; that they selected the stall in which he was to work, could put him to work there, transfer him from thence to another stall, or to other work, for a time long or short, and again restore him to his original place of labour, and that while he was absent from the stall originally selected the respondents paid the filler a fixed daily wage. If he was absent for a week they paid the wage directly to him, but if he was absent for a shorter period his right to this daily wage was, as it were, carried to the credit of his original

(1) [1916] 1 A. C. 612.
(2) [1916] 2 A. C. 63.
(3) [1914] 2 K. B. 497.
(4) [1916] 1 A. C. 612, 627.

stall and entered in the weekly pay-note made out in the number of the stall, not in the name of any workman or workmen, as part of the joint earnings. If the collier was dissatisfied with his filler, his only resource was to complain of him to one of the officials of the mine, who removed him or not as he, the official, deemed prudent. This point is so important that one may be excused for quoting some extracts from the evidence of Fuller, the collier. He was asked, If he shared his wages with the appellant in the way that the total amount of the pay-note was made out to the number of the stall, and that he (the witness) took a shilling per day out of that total for every day he had worked, and then he and the appellant divided the balance equally in accordance with the number of shifts each had worked? And he answered, Yes. He was then asked, How did he first get Churm as a filler, whether he selected him, or the colliery sent him to him? And he replied: 'I did not know he was coming to work with me until after I got to work in the place. The pony-driver brought him in and said, There is a filler here for you.' He further said that the filler pays his own contribution under the Insurance Act." It is impossible to distinguish the boy in the present case from the filler in *Churm's Case*. (1) The matter is made clearer still by *Hooley's Case* (2), where Lord Atkinson, after referring to the fact that Hooley had entered into an agreement to serve the company as a workman underground in their mine, said this: "Who was to pay him the wages is not mentioned in the agreement; but I think a little light is thrown upon that by this, that there is a provision that the company should deduct from his wages certain things in respect of certain benefits conferred upon him, and should also deduct fines, which presumably were imposed upon him at their instance; and certainly it would be a strange construction to adopt that the man who did not pay the wages was to be entitled to make deductions from the wages paid by some person other than himself, more especially if that person be not a party to the contract at all." Then a little further on Lord Atkinson

(1) [1916] 1 A. C. 612. (2) [1916] 2 A. C. 63, 74.

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continues (1): "Now if he was employed as a workman the Act"—i.e., the Coal Mines (Minimum Wage) Act, 1912—"directly applies. It imposes upon the employer who employs him the obligation to pay him wages not less than the minimum." Therefore the real employers are the colliery company; they are bound to pay the wages; and though they pay through the hand of the butty they are the persons liable, and the only persons liable, so far as I can see, to pay the wages. As they are the persons to pay it follows that they are the persons to deliver the detailed statement showing how the amount paid is arrived at. It was argued that the delivery of this detailed statement is inconvenient and unnecessary. As to that, I might content myself with saying that it is not for us to criticize the considered policy of the Legislature, but as a matter of fact some important evidence was given on this question by Mr. Sadler, the secretary of one of the lodges of the Miners' Federation, who was called as a witness for the plaintiff. He stated that he had on two occasions asked that a pay ticket might be given to each boy. The reasons he gave were that many awards and statutory additions to wages had been made retrospective and claims had been made for arrears of wages; that a large number of the boys were badly treated because probably the men could not remember what boys had worked for them in the time past; there was the first war wage, the second war wage, and the award of Sankey J.; all these allowances were retrospective; one of them was a percentage award, in which case it is necessary to ascertain exactly what was earned in the past, and without a pay ticket it is extremely difficult to discover this; a boy's weekly wages depend on the number of shifts he works; it may become desirable for the purpose of the Workmen's Compensation Act, 1906, to ascertain how many shifts a boy has worked, and it may be impossible to do this without some record such as a pay ticket. Therefore if we had to consider this matter there are grounds for saying that the boy is claiming something of substantial benefit.

As to the form of the action, I have no hesitation in saying

(1) [1916] 2 A. C. 75.

that this is precisely the kind of case in which the Court has power to grant relief by way of declaratory judgment, and I should be very sorry to cut down a jurisdiction which was a most valuable addition to the existing powers of the Court. The respondent has a personal statutory right to receive in respect of his wages a statement containing detailed particulars of the amount paid, just as the plaintiff in *Ashby* v. *White* (1) had a right to give his vote for the election of members of Parliament. For failure to allow him this right an action lies ; and not merely an action to recover such damages as the plaintiff has suffered ; the failure is actionable per se, and the plaintiff is entitled to nominal damages at the least, having suffered an injuria even without damnum. I suggest he might get a mandatory order directing those who were withholding the statement to furnish it without delay. But I am clearly of opinion that whenever this right is disputed he can come to the Court and ask for a declaration. The Court has power to make a declaration whenever it is just and convenient ; and if it is just and convenient, as I think it is in this case, he should not be driven to take a course which does not secure the performance of this right or the remedy for the breach of it, but merely leads to the possible conviction of the appellants for an offence before a Court of summary jurisdiction. For these reasons I think the judgment of Bray J., in every part of which I concur, should be affirmed.

Appeal dismissed.

Solicitors for appellants : *Bell, Brodrick & Gray for Kenshole & Prosser, Aberdare.*

Solicitors for respondent : *Smith, Rundell, Dods & Bockett for Morgan, Bruce & Nicholas, Pontypridd.*

(1) (1703) 2 Ld. Raym. 938; 1 Sm. L. C. 12th Ed. 266.

W. H. G.

1921
Jan. 13.

THE KING *v.* JONES AND OTHERS, JUSTICES.

Ex parte THOMAS.

Motor Car—Driving—"Recklessly and at a speed dangerous to the public"—Conviction—Two Offences—Duplicity—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 1.

The applicant was summoned under s. 1 of the Motor Car Act, 1903, for, and convicted of, driving a motor car on a highway "recklessly and at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the said highway, and to the amount of traffic which actually was at the time, or might reasonably have been expected to be, on the said highway":—

Held, that as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.

RULE NISI to certain justices of Anglesey to show cause why a writ of certiorari should not issue to bring up, for the purpose of being quashed, a conviction of the applicant, Reginald Thomas, on the ground that it was bad for duplicity.

The applicant was summoned for having on August 30, 1920, on a certain highway in the county of Anglesey, driven a motor car "recklessly and at a speed which was dangerous to the public, having regard to all the circumstances of the case, etc.," contrary to s. 1 of the Motor Car Act, 1903. (1) The case was heard on September 13 by the justices, who convicted the applicant. The conviction stated that the applicant was convicted of driving a motor car on a certain highway "recklessly and at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the said highway, and to the amount of traffic which actually was

(1) Motor Car Act, 1903, s. 1, sub-s. 1: "If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

at the time, or might reasonably have been expected to be, on the said highway."

The applicant thereupon obtained this rule.

No counsel appeared to show cause.

G. L. Hardy in support of the rule. As no one appears to show cause, I ask that the rule may be made absolute.

[AVORY J. You must argue the point. The rule nisi may have been granted per incuriam.]

The conviction is bad for duplicity. Sect. 1, sub-s. 1, of the Motor Car Act, 1903, creates four distinct offences, and this conviction sets out that the applicant was convicted of two of them—namely, driving recklessly and at a speed which was dangerous to the public. In *Rex* v. *Wells* (1) a conviction for driving "at a speed or in a manner" dangerous to the public was quashed on the ground of uncertainty, Lord Alverstone C.J. pointing out that the two offences were separate offences. In *Cotterill* v. *Lempriere* (2) Lord Esher M.R. said that it was important that the defendant should know which of the two offences charged was proved against him. A conviction must therefore be certain and must not charge two distinct offences. The Irish case *Rex* v. *Cavan Justices* (3) is directly in point. There a person was charged with having driven a motor car on a public highway "recklessly, at a speed and in a manner dangerous to the public," and the justices' order was "Defendant convicted and fined 1*l.*" Palles C.B. said that "were the case to be decided in England it would be held, following *Rex* v. *Wells* (1), that the summons was bad, and that a conviction of guilty on it would be of no avail"; but he pointed out that in Ireland more than one offence may be charged in the summons.

[He also cited *Rex* v. *Slater* (4) and Paley on Summary Convictions, 8th ed., pp. 291, 292.]

LORD COLERIDGE J. This rule must be discharged. The conviction, following the terms of the summons, was for

(1) (1904) 91 L. T. 98.
(2) (1890) 24 Q. B. D. 634.
(3) [1914] 2 I. R. 150, 153.
(4) (1903) 67 J. P. 299.

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driving a motor car "recklessly and at a speed which was dangerous to the public," contrary to s. 1 of the Motor Car Act, 1903. It is true that under that section, which defines four separate offences, a person may be convicted of driving recklessly, or of driving negligently, or of driving at a speed which is dangerous to the public, or of driving in a manner which is dangerous to the public. The question is whether when that which the defendant has done is one act a conviction for driving the car recklessly and at a speed which is dangerous to the public is bad for duplicity. Several cases have been cited to us. The first was *Rex* v. *Wells* (1), where the conviction which set out alternative offences was held to be bad for uncertainty, because it said that the defendant was convicted of driving a motor car on a public highway "at a speed or in a manner" dangerous to the public. It is obvious that the defendant in that case could not know of which offence he had been convicted. A person may drive at a speed dangerous to the public and not in a manner dangerous to the public, or he may drive in a manner dangerous to the public but not at a speed dangerous to the public. In those circumstances the Court said the conviction by reason of its uncertainty could not stand. Again in *Cotterill* v. *Lempriere* (2) a conviction was quashed as being bad for uncertainty. There a by-law provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public." The conviction stated that the defendant permitted smoke to escape contrary to the by-law without stating in terms any reasonable ground of complaint to the passengers or the public, or either of them. Lord Esher M.R. there said that "it is important that the defendant should know which of these two offences is intended to be proved against him. Something is wanting, the want of which might cause injustice." In the other case *Rex* v. *Slater* (3) the conviction was for neglecting to comply with a notice specifying certain matters as to the laying out or construction

(1) 91 L. T. 98. (2) 24 Q. B. D. 634, 639.
(3) 67 J. P. 299.

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of certain streets which were in contravention of the by-laws. The Court held that the conviction was bad, because it set out two separate offences. In the ordinary practice of criminal Courts summonses are not supposed to need superior accuracy to indictments. Where the offences charged consist of one single act they may be made the subject of a single count. Here the defendant's act was one and indivisible—the act of driving which might be both reckless and at a speed dangerous to the public.

AVORY and SALTER JJ. concurred.

Rule discharged.

Solicitors for rule: *Amery Parkes & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

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1920

Nov. 12; *Dec.* 20.

RAWLINGS *v.* GENERAL TRADING COMPANY.

[1919. R. 751.]

Contract—Sale by Auction of Government Stores—Agreement by intending Purchasers for a Knock Out—Legality—Restraint of Trade—Public Policy.

At a sale by public auction of surplus property belonging to the Ministry of Munitions the plaintiff and defendant agreed, in order to avoid competition, that the defendant alone should bid for certain goods, and that the goods, if purchased, should be divided equally between them. In pursuance of that agreement the plaintiff abstained from bidding, and the goods were knocked down to the defendant. The defendant subsequently repudiated the agreement. In an action by the plaintiff to recover one moiety of the goods purchased or the value thereof over and above the price paid at the auction, Shearman J. held that, at any rate where the goods sold were the property of the public, it was against public policy that persons should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public were defrauded. He accordingly held that the agreement was unenforceable. On appeal:—

Held, by Bankes and Atkin L.JJ. (Scrutton L.J. dissenting), that the agreement was not illegal, and judgment should be entered for the plaintiff.

By Scrutton L.J.: The agreement, though reasonable as between the parties, was contrary to public policy as in restraint of trade, contrary

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to the interests of the public, and was unenforceable; and as all the facts were before the Court, the Court itself should take the point, though it was not pleaded.

By Atkin L.J.: As to the question whether the agreement was void as being in restraint of trade, the agreement was not ex facie illegal; as between the parties it appeared to be plainly reasonable; and if the defendant wished to establish that the public interests suffered, he should have so pleaded as to give the plaintiff notice so as to have all the necessary facts before the Court; and he (the Lord Justice) would require to know more of the circumstances before he could express an opinion.

Galton v. *Emuss* (1844) 1 Coll. 243 followed.

Dictum of Gurney B. in *Levi* v. *Levi* (1833) 6 C. & P. 239 disapproved.

Judgment of Shearman J. [1920] 3 K. B. 30 reversed.

APPEAL from the judgment of Shearman J. at the trial of the action without a jury. (1)

The plaintiff was a London merchant, and the defendant was a Mr. E. H. Bradley, who carried on business in Bermondsey under the style of the General Trading Company.

On June 12, 1919, the plaintiff attended at a sale by public auction in Dublin of surplus property belonging to the Ministry of Munitions for the purpose of purchasing certain tin shell cases, included in the catalogue, for which he had a market. He was under the impression that he would be the only purchaser of tins from England, but in the sale room he saw the defendant, whom he knew to be a dealer in tins of that description. The defendant approached him, and on finding that the plaintiff was going to bid for the tins proposed that in order to avoid competition one of them should bid. This was agreed to. It was arranged that the defendant should bid on their joint account, and that whatever he purchased should be divided equally between them, each paying half the purchase money. In pursuance of the agreement the plaintiff abstained from bidding, and the tins were knocked down to the defendant for the price of 342*l*. Two days later, on June 14, the plaintiff wrote to the defendant and offered to sell him his share of the profits for 150*l*. To that letter the defendant did not reply until June 27, when he repudiated the alleged agreement and maintained that he had purchased the goods on his own account alone.

(1) [1920] 3 K. B. 30.

The action was brought to recover one moiety of the tins purchased, or 150*l.*, the value of the said moiety over and above the price paid for it at the auction, and alternatively for an account of the profits realized by the defendant on the resale of the goods. The defendant in his statement of defence merely denied that he had entered into the agreement set out above, and alleged that he purchased the tins solely for his own account. Shearman J., however, did not accept the defendant's account, and found the facts as above set out.

Shearman J. held that, at any rate in such a case as this where the goods were the property of the public, it was against public policy that people should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public were defrauded. He accordingly held that the contract sued on was unenforceable, and gave judgment for the defendant.

The plaintiff appealed.

McCall K.C. and *Walter Stewart* for the plaintiff. An agreement between two or more persons not to bid at a public auction is not an illegal agreement. It is perfectly valid. No one is defrauded thereby. An agreement between two persons that one only shall bid and that the profits shall be divided between them is also perfectly valid. Such an agreement is not against public policy, which has been compared to an "unruly horse, and when once you get astride it you never know where it will carry you": *Richardson* v. *Mellish*. (1) In *Galton* v. *Emuss* (2) Knight Bruce V.-C. held an agreement to that effect to be valid and enforceable as between the parties. That case was followed in *In re Carew's Estate* (3) and *Heffer* v. *Martyn* (4), in the latter of which cases Lord Romilly M.R. said that he decided in *In re Carew's Estate* (3) that the arrangement in that case was not illegal; "that the intending buyers" (of real estate) "may arrange between themselves which lots they will bid for and which

(1) (1824) 2 Bing. 229, 252.
(2) 1 Coll. 243.
(3) (1858) 26 Beav. 187.
(4) (1867) 36 L. J. (Ch.) 372, 373.

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not, and agree not to compete with each other; and if they may do so in that case I think also they may take money for abstaining to compete as well as arrange to take one lot against another." The dictum of Gurney B. in *Levi* v. *Levi* (1) that "if a knot of men go to an auction upon an agreement among themselves of the kind that has been described"—that is, for a "knock out"—"they are guilty of an indictable offence, and may be tried for a conspiracy," was disapproved by Parke B. delivering the judgment of the Privy Council in *Doolubdass* v. *Ramloll* (2), who said that it was a mere dictum in a nisi prius case, and could not be relied on. The doctrine that certain kinds of contracts are void at common law on the ground of public policy should not be extended: *In re Mirams* (3); 1 Smith L. C., 12th ed., p. 436. The remedy of a seller against goods being sold at too low a price is, under the conditions of sale, as might have been done in the present case, to place a reserve price on the goods.

Even if the contract as between the plaintiff and the defendant, that the plaintiff should not bid at the auction and that the goods should be divided equally between them, is not enforceable, the defendant has received goods or money in respect thereof, and the plaintiff can recover the moiety of the goods or the money as having been received to his use: *Bridger* v. *Savage* (4); *De Mattos* v. *Benjamin*. (5)

C. Bray for the defendant. It is admitted that there was no illegal combination to defraud. But the effect was to deprive the vendors of the fair price for their goods, and in that sense to defraud them, and the agreement is therefore against public policy and not enforceable. In *Gilbert* v. *Sykes* (6) Lord Ellenborough said: "Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void." The principle of law as to contracts being void as against

(1) 6 C. & P. 239, 240.
(2) (1850) 5 Moo. Ind. App. 109, 133.
(3) [1891] 1 Q. B. 594, 595.
(4) (1885) 15 Q. B. D. 363.
(5) (1894) 63 L. J. (Q. B.) 248.
(6) (1812) 16 East, 150, 156, 157.

public policy was stated by the House of Lords in *Egerton* v. *Earl Brownlow*. (1) Lord Lyndhurst said (2): "It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void. . . . . Each case must be determined according to its own circumstances." Lord Truro said (3): "Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." Lord St. Leonards, speaking of agreements in restraint of trade, said (4) that "the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day . . . . because a partial restraint . . . . is now perfectly legal." Shearman J. applied the principle laid down in those cases to the present case. It is not necessary in this case to contend that every agreement by two or more persons not to bid against each other is illegal. In the present case State property was being sold, and the effect of the agreement was improperly to deprive the public of the difference between the price realized at the sale and the fair value of the goods for the benefit of the two parties. Such an agreement is illegal as being against public policy, and is unenforceable. That is especially so in the present state of affairs, because war conditions are not yet at an end. Like agreements in restraint of trade, the application of the rule of public policy may vary when circumstances change. On the facts of the present case the agreement is unenforceable. In *Galton* v. *Emuss* (5) the circumstances were quite different. There two landowners, whose lands adjoined the land to be sold, agreed that, in consideration of one of them not opposing the purchase of the land by the other, the first mentioned one should have the right of pre-emption in case the second

(1) (1853) 4 H. L. C. 1.
(2) Ibid. 160, 161.
(3) Ibid. 196.
(4) Ibid. 238.
(5) 1 Coll. 243.

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mentioned one purchased the land and subsequently resold it. Each of those adjoining landowners had an interest in the sale of the land, and the agreement was not against public policy. Moreover, counsel for the defendants declined to take a case for the opinion of a Court of law as to the legality of the contract. The dictum of Gurney B. in *Levi* v. *Levi* (1) strongly supports the judgment of Shearman J., and the only disapproval of it is in the dictum of Parke B. in *Doolubdass* v. *Ramloll.* (2) This agreement " has a tendency to produce a public mischief or inconvenience " within the language of Lord Ellenborough in *Gilbert* v. *Sykes* (3), and is therefore unenforceable. Cases such as *Bridger* v. *Savage* (4) have no application to an action for the direct enforcement, not of some collateral contract, but of the contract which is itself against public policy and therefore unenforceable. It is open to the Court to refuse to enforce the contract on the ground of illegality, though the point is not pleaded : *North Western Salt Co.* v. *Electrolytic Co.* (5)

[Benjamin on Sale, 5th ed., p. 464, citing *Fuller* v. *Abrahams* (6), was also referred to.]

McCall K.C. in reply.

Cur. adv. vult.

1920. Dec. 20. BANKES L.J. read the following judgment : This is an appeal from a judgment of Shearman J., who held that an agreement for what is popularly known as a " knock out " at an auction was against public policy and unenforceable.

It appears to me that this case is covered in principle by the decision in *Galton* v. *Emuss* (7), decided in 1844. No one in that case desired to contest the legality of the contract, and Knight Bruce V.-C. held the contract to be legal and founded on valuable consideration. In the later case of *Heffer* v. *Martyn* (8) decided in 1867, the facts were somewhat

(1) 6 C. & P. 240.
(2) 5 Moo. Ind. App. 133.
(3) 16 East, 156, 157.
(4) 15 Q. B. D. 363.
(5) [1914] A. C. 461.
(6) (1821) 6 Moo. C. P. 316.
(7) 1 Coll., 243.
(8) 36 L. J. (Ch.) 372, 373.

different, but the Master of the Rolls, in commenting on *Galton* v. *Emuss* (1) and a previous decision of his own in *In re Carew's Estate* (2), says this: "The question is whether this circumstance invalidates the sale. I had to consider this in the matter of *In re Carew's Estate* (2), and I came to the conclusion that such an arrangement is not illegal; that the intending buyers may arrange between themselves which lots they will bid for and which not, and agree not to compete with each other; and if they may do so in that case I think also they may take money for abstaining to compete as well as arrange to take one lot against another. This also was considered to be legal by Sir J. Knight Bruce V.-C. in *Galton* v. *Emuss*. (1) I am of opinion that I must follow these cases." So far as I am aware these decisions have never been questioned. A dictum by Gurney B. in *Levi* v. *Levi* (3) at nisi prius to the effect that an agreement by several not to bid at an auction was an indictable offence was expressly disapproved of by Parke B. when delivering judgment in *Doolubdass* v. *Ramloll*. (4) Having regard to the state of the authorities in the Chancery Courts for over 70 years, I do not think that it was open to the learned judge to take the view he did, nor do I think that this Court should after this lapse of time overrule those authorities, even if this Court considered that they were wrong, which I am far from suggesting that they were.

If there was any conflict between the rules of law and the rules of equity on the point (which I do not consider that there was), the latter must prevail: Judicature Act, 1873, s. 25, sub-s. 11. If the law under modern conditions requires alteration, it must, I consider, be altered by the Legislature, and for this reason I refrain from expressing my own opinion upon the point.

For the reason I have given, the appeal must be allowed with costs, and the judgment entered for the defendant set aside and judgment entered for the plaintiff with costs for an account of what tins the defendant has sold or otherwise

(1) 1 Coll., 243.
(2) 26 Beav. 187.
(3) 6 C. & P. 239.
(4) 5 Moo. Ind. App. 133; 15 Jur. 260.

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disposed of, and at what price or for what consideration, and for an account of what tins remain in the defendant's possession and under his control; and for an order that half of any tins remaining in the defendant's possession or under his control and half of any profits realized by a disposal of any of the tins be handed over to the plaintiff.

A second point was made on the appellant's behalf—namely that, even if the agreement was against public policy and unenforceable, the respondent was bound to account for what he had received on the joint account. *Bridger* v. *Savage* (1) was cited in support of this contention. It is not necessary to decide the point. It is sufficient to point out the vital distinction between that case and the present—namely, that in the present case the plaintiff would be seeking to enforce the actual contract which is impeached, whereas in that case the contract sought to be enforced was held to be collateral to the one which was there impeached. See also *Sharp* v. *Taylor* (2); *Farmer* v. *Russell* (3); *Thomson* v. *Thomson* (4); and *Cohen* v. *Kittell* (5) per Manisty J., where this distinction is referred to.

SCRUTTON L.J. read the following judgment: S. H. Rawlings claims from one Bradley, who carries on business as the General Trading Company, half the goods bought by Bradley at an auction sale in Dublin of Government stores, or their value. He claims it under an agreement between himself and Bradley, that if Rawlings did not bid against Bradley at the auction, the two should share the purchases by Bradley. Such an agreement is the simplest form of a transaction which with more parties, and a little more complication in bidding, is popularly known as a "knock-out." Shearman J. has found the agreement proved, disbelieving Bradley's denial, but has held it unenforceable as against public policy, at any rate where the goods sold are Government stores.

(1) 15 Q. B. D. 363.
(2) (1848) 2 Ph. 801, 816.
(3) (1798) 1 Bos. & P. 296.
(4) (1802) 7 Ves. 470, 473.
(5) (1889) 22 Q. B. D. 680, 683.

The question is whether this contract will be enforced by the Courts, and it may be unenforceable though it is neither criminal nor actionable. The position of contracts in restraint of trade has been so clearly stated by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Co.* (1), as explained and amplified by Lord Parker in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2), and with the concurrence of Lord Sumner in *Herbert Morris* v. *Saxelby* (3), as to excuse any but the briefest restatement. Contracts or combinations in restraint of trade are neither criminal nor actionable at common law unless they can be made out to be conspiracies to attain an unlawful end, or a lawful end by unlawful means ; and it is not unlawful to combine to protect your own trade interests, though by so doing you injure another. But such contracts or combinations, though neither criminal nor actionable, may be unenforceable. Of the Law Lords who held that the combination of a " ring " in *Mogul Steamship Co.* v. *McGregor* (4) gave no cause of action to the shipowner it drove out of the trade, Lord Halsbury L.C. (5), Lord Watson (6), Lord Bramwell (7), Lord Morris (8), and Lord Hannen (9) all said that the agreement to combine was unenforceable.

It is not therefore necessary to find that the agreement in the present case is either criminal, or actionable at the suit of the vendors. I am clearly of opinion it is not. The question is whether it is contrary to public policy as in restraint of trade, and therefore not enforceable.

Now as explained by Lord Parker in *Herbert Morris* v. *Saxelby* (3) two tests have to be considered : First, Is the restraint of trade imposed by the contract reasonable in the interests of the parties—i.e., does it afford no more than adequate protection to the party in whose favour it is imposed ? Secondly, Is the restraint of trade reasonable in the interests

(1) [1894] A. C. 535.
(2) [1913] A. C. 781, 793, 797.
(3) [1916] 1 A. C. 688, 707, 708.
(4) [1892] A. C. 25.
(5) Ibid. 39.
(6) Ibid. 42.
(7) Ibid. 46.
(8) Ibid. 51.
(9) Ibid. 58.

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of the community or the public? If it is reasonable in the interest of the parties, the party alleging unenforceability on the second ground must prove it. Now in this case the plaintiff was by the contract restrained from bidding at the auction. As between the parties I see nothing unreasonable in this; he was to get half the goods bought at a price which would be lower because he did not bid, and might therefore well be restrained from bidding and so raising the price. But the effect on the public or the community was that free competition at auctions, affording a ready market for realizing goods, was restrained, and the property of any member of the public selling goods might be sold below its true value. This is especially true where the goods sold were those of the public themselves, of the State. In this case goods bought for 342*l.* have apparently been resold for at least 642*l.*, a profit on expenditure of nearly 90 per cent. The agreement, if carried out or enforced by injunction, would deprive the public of the advantage of free competition at auctions. I cannot think the Courts would enforce by injunction an agreement not to bid at an auction.

The decisions on auctions with one exception throw very little light on this matter. At law at a sale advertised as to the highest bidder, the vendor might not employ a "puffer" to bid on his behalf: *Mortimer* v. *Bell*. (1) This was because it was a breach of his representation that the highest bidder other than himself would get the goods, and was rested on fraud. Attempts by vendors to reopen a contract of sale as obtained by fraud, where the purchaser had agreed with some one else that the latter should not bid against him, failed because there was nothing fraudulent or illegal, in the sense of criminal, in such a bargain: *In re Carew's Estate* (2), in which the attempt to attack the agreement was rested on fraud on the authority of a passage in Sugden's Vendors and Purchasers; *Heffer* v. *Martyn*. (3) These were cases between vendor and purchaser where the contract between them was unaffected unless the purchaser had obtained it by fraud

(1) (1865) L. R. 1 Ch. 10. (2) 26 Beav. 187.
(3) 36 L. J. (Ch.) 372.

on the vendor. In *Galton* v. *Emuss* (1) however the Court of equity did enforce an agreement between owners of neighbouring landed estates not to bid at an auction for land, on the terms that one should have a right of pre-emption over the lands of the other. This latter right was enforced by specific performance. It is to be noted that the parties were offered an argument in the Courts of law on the legality of such a contract and refused, so it was taken there was no authority against the legality of the contract; and the point of restraint of trade was not argued. This may turn on the relations of neighbouring landowners, and does not seem to me to apply to sales of goods; anyhow the question of law was not argued, and I cannot regard it as a decision binding me to hold that the contract in this case is not in restraint of trade as injurious to the interests of the public.

It is true that the point of illegality of the contract was not pleaded; the defendant only said there was no such contract. *North Western Salt Co.* v. *Electrolytic Co.* (2), in which I was the trial judge, decides clearly two points. First, that where illegality by restraint of trade is not pleaded, and the question whether the restraint be unreasonable in the interests of the public may depend on a number of circumstances not pleaded or proved, the Court itself should not take the point, as the plaintiff has had no opportunity of producing the necessary evidence. This is especially true in trade agreements fixing prices, where the numerous considerations pointed out by Lord Haldane L.C. (3) have to be weighed. In the case in question the Court of Appeal had derived most of their material for unenforceability from a collateral agreement not the one sued on. But secondly, the judgments of the Court make it clear that where all the facts are before the Court, and it can see clearly that it is contrary to public policy to enforce the agreement, the Court should act, though the pleadings do not raise the point. The result may be to leave unfair and ill-gotten gains in the hands of one of the parties, but that

(1) 1 Coll. 243.
(2) [1914] A. C. 461.
(3) Ibid. 469, 470.

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is a frequent consequence of entering into unenforceable agreements.

In this case I am satisfied that all the relevant materials are before the Court, and on them I am of opinion that the contract sought to be enforced is against the public interests. There is in this case no account stated which would allow the action to be brought, though the executed consideration was unenforceable if executory, as was the case in *Evans & Co.* v. *Heathcote.* (1) *Bishop* v. *Kitchin* (2) did decide that after consideration executed a contract in restraint of trade could be enforced, but that case was so doubted in *Evans & Co.* v. *Heathcote* (3) that I cannot follow it, and think it was wrongly decided.

It was, however, suggested by the Court that this might be one of the cases where B. has received on behalf of C. money from A. under a contract which is illegal or void, but cannot successfully object to pay it to C. on the ground of such illegality. Examples of such cases are *Tenant* v. *Elliott* (4); *Farmer* v. *Russell* (5); *Sharp* v. *Taylor* (6); and *De Mattos* v. *Benjamin.* (7) But in all these cases there was no illegality between plaintiff and defendant; the defendant was saying the money had come to him as the proceeds of an illegal contract, and therefore one of the parties to the illegal contract could not claim it from him, though the other party did not object to its being paid over. The case appears quite different where the unenforceability is in the direct contract between the plaintiff and defendant, not in a collateral contract under which the defendant has received the money. This is the distinction taken by Sir William Grant M.R. in *Thomson* v. *Thomson* (8): "You have no claim to this money except through the medium of an illegal" (unenforceable) "agreement . . . . and it is impossible for the Court to enforce it"; see also Pollock on Contracts, 8th ed., p. 398. Here if, as I have held, the contract is unenforceable as in restraint of

(1) [1918] 1 K. B. 418, 431.
(2) (1868) 38 L. J. (Q. B.) 20.
(3) [1918] 1 K. B. 427, 428, 431, 437.
(4) (1797) 1 Bos. & P. 3.
(5) Ibid. 296.
(6) 2 Ph. 801.
(7) 63 L. J. (Q. B.) 248.
(8) 7 Ves. 470.

trade, the plaintiff is trying to enforce it in asking for the goods due to him under it. It is true the defendant does not plead illegality but denies the contract, but, this being found against him, if the Court is satisfied that the contract is unenforceable as in restraint of trade, the Court itself is bound to take the point, and not to enforce a contract contrary to public policy.

For these reasons, I think the judgment of Shearman J. should be affirmed and the appeal dismissed with costs. I cannot believe that, if the parties to an agreement for a knock out came to the Court for an injunction to restrain one of their members from bidding at the auction contrary to his agreement, the Court would grant the injunction. The Court would refuse it in my view, because the agreement was contrary to public policy, as a restraint of trade contrary to the interests of the public. Nor would the Court take an account of the profits resulting from a knock out for the same reason.

I only desire to add that in saying these agreements are not criminal or actionable, I do not refer to any cases in which intending purchasers are induced not to bid by threats of violence or misrepresentations.

ATKIN L.J. read the following judgment: The learned judge has held that the agreement made between the parties, as stated by the plaintiff whose evidence was accepted by him, is void as being against public policy. The ground is stated in the report in the Law Reports as follows (1): "I am of opinion that, at any rate in such a case as this where the goods sold are the property of the public, it is against public policy that people should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public are defrauded." The only evidence as to the price eventually obtained being below the fair value appears to be the fact that the plaintiff offered to sell to the defendant, who had bought the goods in very large quantities for 342*l.*, his half share of the net profit in the disposal of them for 150*l.*—a total profit which would

(1) [1920] 3 K. B. 35.

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amount in commercial computation to something less than 50 per cent. I am quite unable to see any evidence of any such combination as is suggested. Under the conditions of sale the auctioneer had power to fix a reserve price. Whether there was a reserve price for these goods is not proved. In any case there is no evidence that the price was not satisfactory to the seller or to the auctioneer. But assume that the goods had to be sold to the highest bidder, would it have been illegal for either plaintiff or defendant to absent himself from the auction, or being there to refrain from bidding? And if not, would it have been illegal for both to have agreed to absent themselves or refrain from bidding? The result would presumably have been still worse for the seller, for the prices would not have been raised to the level of the defendant's bids. I see no principle upon which sales by auction differ from an offer of sale by tender or indeed by private treaty, except that at an auction without reserve the goods are offered to the purchaser who there and then offers the highest price. Why it should be illegal for two possible competitors to agree to a joint adventure in the purchase of an article offered for sale in any of the ways I have mentioned I cannot discern. If, of course, there is any combination to make misrepresentations express or implied with intent to deceive the seller, which are proved to have deceived the seller, the seller will presumably have his remedy, and the agreement so to deceive will be illegal and unenforceable; but I can see no evidence of such an agreement in the present case. The only suggestion made was that the plaintiff said in evidence: "I bid against the Irish buyers to show strength." There is no evidence that this was done in pursuance of the agreement between the parties, and with no other evidence it appears to me to fall far short of evidence of an agreement to defraud. The learned judge relies for authority on a nisi prius report (in 1833) of a passage in the summing up of Gurney B. to a jury in *Levi* v. *Levi*. (1) The action was for slander in saying of the plaintiff: "You are a common thief, and I can prove you one." It is not stated whether there was a plea of

(1) 6 C. & P. 239, 240.

justification. The report states that from the cross-examination of the plaintiff's witnesses it appeared that certain brokers attending auction sales took part in what was then and is now called a "knock out." The report does not state that the plaintiff was such a broker. The report proceeds to give as an extract from the summing up the following sentence: "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves of the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy"; and then states that the judge "left it to the jury to say, whether the defendant by the words he spoke meant to impute felony to the plaintiff? Verdict for the defendant." If, as must be assumed, the only issue between the parties was that left to the jury, the remark was a mere dictum, and unless the practice was brought home to the plaintiff would be irrelevant even to damages. The learned judge states that it met with the approval of Mr. R. S. Wright, afterwards Wright J. The passage in Wright on Criminal Conspiracies, ed. 1873, p. 34, is as follows: "A case (1833, *Levi*) in which a 'knock out' at an auction was held indictable, may be thought to have gone to the farthest extent which is compatible with the application of any principle. It may be explained on the ground that, had the auctioneer known of the combination, he would not have knocked down the goods to any of the persons concerned in it; that his consent to the transfer of property was obtained by a false appearance of competition." So tepid an approval, if approval it be, does not appear sufficient to infuse warmth into a dictum already killed in 1850 by Parke B. in delivering the judgment of the Privy Council in *Doolubdass* v. *Ramloll*. (1)

There remains the question whether the contract is void as being in restraint of trade, a question not raised upon the pleadings, or, as far as I can see, at the trial. The principles applicable to such a set of circumstances are laid down by the House of Lords in *North Western Salt Co.* v. *Electrolytic*

(1) 5 Moo. Ind. App. 133.

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Co. (1) There the plaintiffs sued upon an agreement which involved an obligation upon the parties not to sell salt except at agreed prices and in agreed quantities. The defence of restraint of trade was not pleaded, and the trial judge had refused to allow it to be raised by amendment at the trial. The Court of Appeal by a majority gave effect to their view that the contract was in restraint of trade. On appeal the House of Lords reversed this decision. I will cite two passages. Lord Haldane L.C. said (2): "My Lords, the law as to contracts in restraint of trade is not doubtful. In order to be valid a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which show the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the Court, and is not an issue of fact. My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what isr easonable as between themselves." Lord Haldane quotes (3) Lord Parker in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (4) as saying that it is "clear that the onus

(1) [1914] A. C. 461.
(2) Ibid. 470.
(3) Ibid. 472, 473.
(4) [1913] A. C. 796.

of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one." Then Lord Haldane goes on: "My Lords, I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a Court of justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public." Lord Moulton, in dealing with the defence of restraint of trade as being contrary to public policy, said (1): "This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, De non apparentibus et de non existentibus eadem est ratio, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the Court at the end of the case are therefore only a casual selection from the surrounding circumstances, and the Court has no longer the right to treat them as properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs,

(1) [1914] A. C. 476.

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as fairly representing the whole setting." I can see no reason for saying that this contract is ex facie illegal. It would probably be sufficient to say that for nearly a century Courts of equity have held similar agreements legal and enforceable by suit for specific performance. But apart from decided cases, as between the parties it appears to be plainly reasonable, and if the defendant wished to establish that the public interests suffered he should have so pleaded so as to give the plaintiff notice. If I may adopt the language of Lord Sumner in the case above cited (1): "I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of" these tins.

Whether, if the agreement not to bid were void as being in restraint of trade, the defendant could nevertheless, when the agreement is executed, hold for his own use the goods which undoubtedly he bought on joint account, and whether it could be said that there was no severable legal relation between the parties, is a question that on my view it becomes unnecessary to discuss. I content myself with saying that the contrary view can be plausibly argued.

I think that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Bolton, Jobson, & Yate-Lee.*
Solicitor for defendant: *G. S. Crawshay.*

(1) [1914] A. C. 481.

W. F. B.

MASON, HERRING AND BROOKS *v.* HARRIS AND ANOTHER.

1921
Jan. 22.

[1920. M. 3226.]

Landlord and Tenant—Assignment of Lease—Premium—Legality—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8, *sub-s.* 1.

An assignment of a lease is not within the prohibition in s. 8, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, of the payment of a premium "as the condition of a grant, renewal, or continuance of a tenancy."

TRIAL of short cause before Shearman J.

In November, 1920, a Mrs. Walters was the holder of the lease of a flat at a rent of 70*l.* per annum originally granted for seven years from July 18, 1918, at 17, Abercorn Place, St. John's Wood, and by an assignemnt dated November 11, 1920, assigned the residue of the term to the defendant, Julius George Harris, in consideration of a payment of 75*l.* The plaintiffs, Mason, Herring and Brooks, estate agents, acted as agents for Mrs. Walters, and on November 11, 1920, the defendant handed them a cheque drawn by himself and the other defendant Henry Harris, his partner, for 80*l.* 8*s.* 6*d.*, being the above 75*l.* and including some other items. On the same day the defendant Julius George Harris alleging that he had discovered certain facts which in his opinion made it inequitable that he should pay as much as 75*l.* for the lease, stopped payment of the above cheque. The plaintiffs thereupon brought this action claiming 80*l.* 11*s.* 1*d.*, being the amount of the cheque and 2*s.* 7*d.* interest.

At the trial the defendants set up the defence that the payment of the 75*l.* would be illegal by reason of the provisions of s. 8, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which enacts: "A person shall not, as a condition of the grant, renewal, or continuance of a tenancy . . . . require the payment of any . . . . premium, or other like sum, or the giving of any pecuniary consideration,

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in addition to the rent," and further enacts, that if such payment is made "the amount or value thereof shall be recoverable by the person by whom it was made or given."

Pritt for the plaintiffs. The assignment of the lease was not a "grant, renewal, or continuance of a tenancy" within the meaning of s. 8, sub-s. 1, of the Act of 1920. To hold that it was would prevent any assignment except assignments made for no payment.

Elkin for the defendants. This transaction was within the purview of the Act, which, while not dealing with leases of fourteen years and upwards—s. 8, sub-s. 3—was intended to prevent trading in short terms. In almost every section of the Act the word "landlord" is used, but in s. 8, sub-s. 1, the word "person" is employed, which shows that its provisions apply to others besides the landlord. This was the "grant" of a tenancy within the meaning of sub-s. 1. Stroud's Judicial Dictionary, 2nd ed., vol. ii., p. 835, tit. Grant, says, quoting Touch. 228, "'This word is taken largely, where anything is granted or passed from one to another. And in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like; for he that doth give, or sell, doth grant also.'" This was clearly a sale, and therefore a grant, for the defendant was granted possession to which otherwise he would have no right. If the argument for the plaintiffs prevails it will be easy to evade the Act.

Pritt in reply. Sub-s. 2 of s. 8 makes a contravention of sub-s. 1 a criminal offence; therefore the sub-section must be construed strictly. By sub-s. 3 the section is not to apply "to the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy." If the defendants are right one would have expected words which would also exclude from the operation of the section assignments for a residue of more than fourteen years.

[He was stopped.]

SHEARMAN J. The facts of this case are not in dispute. The defence set up is that the payment of the 75*l.* in respect

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of that assignment was unlawful, because it was a premium given for the grant of a tenancy contrary to s. 8, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; in other words it is contended that a person can only assign his tenancy if he does so for nothing. It is contended for the defendants that there is here both a landlord and a tenant, and that this assignment is a "grant" within the meaning of the sub-section. In my opinion "grant" refers to the creation of a tenancy between the grantor and the grantee, and an assignment of a tenancy does not come within the operation of s. 8, sub-s. 1, of the Act. There must therefore be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Mayo, Elder & Co.*
Solicitor for the defendants: *A. J. Evans.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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Nov. 25.

LINGLEY *v.* THOMAS FIRTH AND SONS, LIMITED.

Employer and Workman—Compensation—Injury by Accident—Failure to make Claim within specified Period—"Reasonable cause"—Subsequent Delay—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1 (*b*).

Where "reasonable cause" is established within s. 2, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1906, for failure to make a claim for compensation within six months of the occurrence of an accident which has occasioned injury to a workman, the bar to the maintenance of proceedings under the Act is removed, and, subject to the ordinary Statute of Limitations, proceedings can be maintained at any time after the expiry of the specified period.

On August 21, 1917, the applicant, a munition worker in the employ of the respondents, was injured by a shell falling upon her toe. She was treated in the firm's ambulance room, and the accident was noted in their accident book. She returned to the factory after a day's absence and continued to work until December, 1918, when the factory was closed. During the last twelve months of her employment she received higher wages. She was in constant pain and used to sit down at her work, but, when any of the officials of the factory appeared, she used to stand up as if there were nothing the matter with her. After her discharge her toe became worse and ultimately, in February, 1920, it had to be amputated. She then made a claim for compensation under the Act.

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She stated that she had not made a claim before because she did not regard the injury as serious. The respondents objected that the claim had not been made within six months of the occurrence of the accident as required by s. 2, sub-s. 1, of the Act :—

Held, that there was no " reasonable cause " for her not having made her claim within the six months, and that the arbitration proceedings were not maintainable.

APPEAL from an award of the judge of the Rotherham County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

In this case compensation was claimed by Mrs. Elsie Lingley, who had been employed as a munition worker by the respondents, Messrs. Thos. Firth & Sons, Ld., from March 29, 1916, to December, 1918, when their munition factory was closed. On April 21, 1917, while engaged in examining 6 in. shells, one of them rolled off a bench and fell upon her foot, injuring the big toe. She was taken to the firm's ambulance room, where the injured toe was dressed and the accident noted in the firm's accident book. She returned to her work on April 23 and continued to have her toe dressed in the ambulance room each day for a week. The nail came off and another one grew. In August, 1917, another shell fell upon the same toe inflicting further injury. She again went to the ambulance room, where the accident was similarly noted and her toe was dressed daily for a week. She continued working, however, though, as she said in her evidence, she never had ease after the second accident. She had to sit down and rest while at work, and if she saw any official she used to stand up as if nothing were the matter with her. She ceased going to the ambulance room, because she was afraid of the doctor pricking the injured toe, but she poulticed it at home. She continued working until the factory was closed, after the armistice, in December, 1918. Up to that time she had made no claim for compensation. According to her evidence the toe became gradually worse. It was operated upon in August, 1919, and again in January, 1920. On February 24, 1920, it was amputated. On February 26, 1920, her husband, who had been absent on military service but had returned home in July, 1919,

consulted a solicitor. She said that she did not make a claim because she did not think the injury was serious, and, her husband being away on service in the Army, she had no one to advise her what to do. After both accidents she went on working at the same work, and during the last twelve months before the closing of the factory she earned higher wages, having been promoted to be a "charge hand." After she left the factory she tried to get other work but failed to do so. On February 26 she made a formal claim for compensation, and on May 13, 1920, she applied for an arbitration. The respondents in their answer relied (inter alia) upon the fact that the claim for compensation was not made within the time limited by the Workmen's Compensation Act, 1906.

Sect. 2 of the Act provides (sub-s. 1) that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable . . . . unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . . .

Provided always that . . . . (*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

Upon the hearing of the arbitration the county court judge held (1.) upon the evidence that there was "reasonable cause," within s. 2, sub-s. 1, of the Act, for the applicant's failure to make a claim within the prescribed six months; and (2.) that when once the bar to the proceedings had been surmounted by the establishment of "reasonable cause" there was no further limited period within which the claim must be made. He accordingly held that the proceedings were maintainable, and awarded compensation to the applicant.

The respondents appealed.

Sir E. Pollock S.-G., G. A. H. Branson and *H. D. Samuels* for the appellants.

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There was no "reasonable cause" in this case for the failure to make a claim for compensation within the statutory period, and the proceedings cannot therefore be maintained. The applicant alleges that she did not think the injury which she had sustained was of a serious nature; but the evidence shows that she did not wish to lose the employment in which she was earning good wages. That was not "reasonable cause" in law within s. 2; and there is no evidence of "reasonable cause."

The provision of a period of limitation within which the claim must be made is intended to afford protection to the employer, so that he can take the necessary steps for proper treatment, and obtain and keep evidence to enable him to resist the claim. The county court judge has held that when once "reasonable cause" for failure to make the claim within the six months has been established, then any subsequent delay is immaterial. The dicta of Duke L.J. in *Prophet* v. *Roberts* (1), and of Eve J. in *Hillman* v. *London, Brighton and South Coast Ry. Co.* (2) are strongly opposed to that view. The holding of the learned county court judge on that point cannot be supported.

[They also referred to *King* v. *Port of London Authority* (3), *Thompson* v. *Goold & Co.* (4) and *Leslie* v. *Robson.* (5)]

Jardine for the respondent. The county court judge was right in holding that when once the bar to the proceedings is surmounted by establishing "reasonable cause" for failure to make a claim within six months, then there is no further limit. The applicant thought the injury was trivial—that was "reasonable cause" for not making a claim. The plain words of the Act having regard to *Powell* v. *Main Colliery Co.* (6) conclude the case.

See also *Luckie* v. *Merry* (7) and *Hoare* v. *Arding & Hobbs.* (8)

Sir E. Pollock S.-G. in reply referred to *Webster* v. *Cohen.* (9)

(1) (1918) 11 B. W. C. C. 301, 310.
(2) [1920] 1 K. B. 284.
(3) [1920] A. C. 1.
(4) [1910] A. C. 409.
(5) (1920) 13 B. W. C. C. 150.
(6) [1900] A. C. 366.
(7) [1915] 3 K. B. 83.
(8) (1911) 5 B. W. C. C. 36, 38.
(9) (1913) 6 B. W. C. C. 92.

LORD STERNDALE M.R. This case raises one point of general importance and another which is only of importance upon the facts of the case. The second point has given me more trouble than the first. [The Master of the Rolls read s. 2, sub s. 1, of the Act and continued :] The first point arises in this way. The learned county court judge said this : "If there are circumstances excusing the making of a claim within six months, then, assuming that notice of the accident has been given, a delay in making the claim after the six months, however long, subject to the ordinary Statute of Limitations, is of no effect as an answer to the claim." It is contended that that is wrong, and that the Court ought to take into consideration whether, although the six months' delay was excused, any further delay which may occur after the six months is also excused ; and in support of that contention a dictum of Duke L.J. is referred to in *Prophet* v. *Roberts* (1) to this effect : " One further question to which I referred which seems to me of some consequence was the contention which counsel for the applicant raised that, assuming there was reasonable cause within six months after the accident which deprived the employer of the protection of the statute as to those six months, then no subsequent lapse of time, however unreasonable, would deprive the applicant of the right to claim. I have great difficulty myself in coming to the view that that was the intention of the Legislature. With a short term of limitation such as six months, and an excuse for failure within the six months, it is to me almost inconceivable that the Legislature should have intended that lapse of time for years after the expiration of the period must be put out of account, and that the existence of reasonable cause during the six months must form an absolute excuse and advantage to the applicant. The question does not arise for decision in this case, but my own view is that the suggested construction of the statute is contrary to the probable intention of the Legislature, and certainly contrary to good sense."

I notice that the learned judge does not there state what he

(1) 11 B. W. C. C. 301, 310.

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thinks is the true construction of this provision of the statute, but he thinks that the Legislature could not possibly have intended that an excuse for the failure to make a claim within six months should be an excuse altogether, and he thinks it is contrary to common sense.

Another dictum to the same effect is that of Eve J. in *Hillman* v. *London, Brighton and South Coast Ry. Co.* (1) The learned judge said this: "I only desire to add that I respectfully adhere to what was said by this Court in *Prophet* v. *Roberts* (2) with regard to the requirement that a claim for compensation should be made within six months. In determining whether the proviso in s. 2, sub-s. 1 (*b*), of the Act has become operative, it is incumbent firmly to bear in mind that the subsection constitutes a statutory protection for the employer; a protection of which he ought not to be deprived unless all the circumstances warrant the conclusion that reasonable cause for not complying with the statute has been proved to exist. I think that the length of time which has elapsed since the expiry of the six months must always be a very material factor in determining whether or not that state of things has been proved to exist."

With the greatest respect for the learned judges who uttered those dicta it seems to me that those are speculations as to what the Legislature might have intended, and ought to have intended, and perhaps did intend; but they are not considerations of what is the meaning of the words which the Legislature has used, and to my mind that is the point to which we have to direct our attention. I have read the words of this section and the proviso, and I should like to point out this, that if the words "claim for compensation" were to be read as "the commencement of proceedings for compensation," as to which I have already expressed my opinion that that was probably what the Legislature intended, the proviso would be perfectly logical, and would fit in very well, because then the failure to make a claim within the period above specified would be an absolute bar, it would be a Statute of Limitations such as the statute with regard

(1) [1920] 1 K. B. 284, 300. (2) 11 B. W. C. C. 301.

to the bringing of actions within six months in the case of actions against public authorities. But that has been decided not to be the true meaning of the expression "claim for compensation." It has been decided by the House of Lords in *Powell* v. *Main Colliery Co.* (1) to mean any claim of any sort however informal, any notice of intention to make a claim, and that interpretation of the words "claim for compensation" does, to a certain extent, make the proviso somewhat difficult, although I think that on the whole it is fairly clear. I cannot see how that proviso deals with anything at all, except the period of six months. It may be that it would have been common sense for the Legislature to have gone further and to have provided something different, but it seems to me that the argument for the appellants in this case involves this, that you must read the proviso as meaning that a claim must be made within six months or, that if there is a reasonable excuse for not making it within six months, then it must be made within a reasonable time after the six months. I can find no such provision in the Act, and, as was pointed out by one of my colleagues, there are other provisions here, and one of the grounds excusing the failure to make a claim is, in addition to reasonable cause, absence from the United Kingdom for six months. Suppose the person who is making the claim had been absent from the United Kingdom for six months, that obviously would excuse the failure to make a claim within the six months. Then suppose the person who had to make the claim came back again after the six months, apparently another period of limitation is then to run within which he is to make his claim unless excused by reasonable cause, but there is no such provision in the Act at all. In my opinion the learned judge was right in saying that this bar of six months being once got rid of by reasonable cause for the failure to make the claim within the specified period, the appellants cannot take up the ground that although the failure within the six months was excused there has been subsequent unreasonable delay. As long as no Statute of Limitations

(1) [1900] A. C. 366.

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has been infringed I think the learned judge was quite right as to that, and that the proper construction is that the only thing with which that proviso is dealing is the failure to make a claim within the six months; that being gone the bar is gone also. That is the point which is of general importance.

The other point, which is only of importance in this particular case, is whether there was reasonable cause for not making the claim within the six months. [The Master of the Rolls stated the facts and continued:] The applicant says: "I did not make a claim because I did not think it serious, and my husband being away in the Army I had no one to advise me what to do." I need not trouble about the second ground because it has been decided in cases by which we are bound that ignorance on the part of the applicant of his rights under the Workmen's Compensation Act is not a reasonable cause for a workman not making a claim. Therefore the ground which I have to consider is that she says she did not make a claim because she did not think it serious.

Now this, as I have said, is not a question of notice. It is a question of making a claim. If "claim" had been interpreted as meaning "the commencement of proceedings" of course the limitation is of very great importance indeed, because it would be an absolute bar to the proceedings; but it has been held, as I have said, that any claim however informal will be sufficient to save an applicant's rights, and that if any claim however informal is made within six months the actual proceedings may be delayed for any time up to six years, and for that reason I confess I expressed an opinion in *Luckie* v. *Merry* (1), founded on the facts of that case, that the making of a claim was a mere formality and technicality. It seemed to me to be a matter of very slight importance indeed. The only way in which it could affect the interests of the employer at all would be that upon the claim not being made he might decide to take no notice of the accident having happened, and evidence which otherwise might be useful might be lost. It seems to me that in ninety-nine

(1) [1915] 3 K. B. 83.

cases out of a hundred just the same consequences would follow if there were made merely such an informal claim as I have just mentioned and then nothing done for a great number of months or years afterwards. It still appears to me to be very much a technicality, and a matter of very slight importance on the present interpretation of the words "claim for compensation," but I think I am very likely to be wrong in that opinion because the late M.R., Lord Swinfen, in *Prophet* v. *Roberts* (1) took a different view, although he had cited to him what I had said. He was not however dealing really with the view I had expressed, but with a similar view expressed by Lord Atkinson in *Thompson* v. *Goold & Co.* (2), a view in conflict with a statement of the same noble Lord in *King* v. *Port of London Authority* (3); and after referring to what Lord Atkinson had there said, he said: "In my opinion it"—that is, the provision as to making a claim—"is a substantial and material protection to the employer, and is not a pure technicality or idle form." I need hardly say that if I differ from the late Lord Swinfen I am probably wrong. I rather think that, at any rate, one of my colleagues is inclined to take a different view in this case as to the importance of the claim, but with regard to that it is perhaps some satisfaction to me that I have the support of the opinion of Lord Atkinson, although, in another case, he is said to have expressed an opposite one. In *Luckie* v. *Merry* (4) I think I had the support of the other members of the Court sitting with me. That is really a matter not worth discussing. In my opinion, the provision as to making the claim being a technicality of no great importance to anybody, reasons or circumstances of lesser importance might constitute reasonable cause for not making a claim than would be requisite to constitute reasonable cause for not giving a notice. I consider the notice very much more important than the claim, but that is the only bearing that the matter has, that is, that reasonable cause might be established for failure to make a claim by circumstances

(1) 11 B. W. C. C. 301.
(2) [1910] A. C. 409.
(3) [1920] A. C. 1, 29.
(4) [1915] 3 K. B. 83.

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which would not nearly establish it in the case of an absence of notice; but there must be reasonable cause.

It is stated, I think very fairly, by Judge Adshead Elliott at p. 153 of his book on the Workmen's Compensation Act: "There have been a great many cases before the Court of Appeal dealing with the words 'mistake or other reasonable cause,' and the principle to be deduced from the decisions appears to be this:—Unless the injury from the accident is latent—not at first apparent—or is apparently so trivial that it would be absurd to expect a notice to be given, the failure to give notice as soon as practicable after the accident is not due to mistake or other reasonable cause." Now in *Webster* v. *Cohen Bros.* (1) I find Lord Sumner, then Hamilton L.J., saying this: He cites what was said by Buckley L.J. in *Roles* v. *Pascall & Sons* (2), and then he says: "I think therefore that it is not reasonable cause for a workman failing to give notice of his accident if he says, 'I do not think I shall want to make a claim; I am sanguine about my recovery, and, therefore, I will not give notice of my accident.'" In *Roles* v. *Pascall & Sons* (2) Buckley L.J. had explained the meaning of "reasonable cause." The question is whether the facts of this case come within those words that I have read from the judgment of Hamilton L.J. The facts are found by the learned county court judge in almost the words in which the evidence was given by the applicant: "The toe discharged after the second accident and, although the applicant stated that she never had ease after the second accident, she continued at work until December, 1918, and for the last twelve months or so she received higher wages than before the first accident owing to having been promoted to be 'a charge hand.'" I have also pointed out that she says she had to sit down during her work, but that when anybody in authority came along she used to stand up that they might not find it out. I have to deal with the case, according to the recent authorities on questions of law, on the facts as found. I regret to say that I do not think that these facts constitute a reasonable cause for not making a

(1) (1913) W. C. R. 268. (2) [1911] 1 K. B. 982.

claim, because it seems to me they come within the words that I have mentioned, and what it comes to is this, that the poor woman did not wish to make any claim or to do anything that would interfere with the very profitable employment in which she was working. She hoped to get better; unfortunately her hope was disappointed, and she had clearly before her mind all the time, as the applicant had in *Webster* v. *Cohen* (1), that there was an injury which was causing her pain, and causing her, to a certain extent, disability, and which showed to her that there was something the matter with her in consequence of the accident that was not trivial. Therefore it seems to me, although as I say I regret it, that the county court judge was wrong in saying on the facts, as he found them, that there was reasonable cause for not making the claim here, and therefore I think that the appeal must be allowed, and there must be an award for the appellants, I suppose with costs here and below.

WARRINGTON L.J. I am of the same opinion. With regard to the first question I agree with the view taken by the county court judge, and I think I can state very shortly the way in which I arrive at that conclusion. The Act provides that proceedings for the recovery of compensation shall not be maintainable unless the claim for compensation is made within six months. Therefore so far there is a bar to the proceedings if the claim, whatever is meant by the claim, is not made within six months after the occurrence of the accident. That is subject to this proviso, that a failure to make the claim within the six months shall not be a bar to the maintenance of such proceedings if it be found that the failure was caused by mistake, absence from the United Kingdom, or other reasonable cause.

But it appears to me that if it is found that the failure to make the claim within six months was occasioned by reasonable cause, then the bar provided by the statute is gone altogether, and that any subsequent delay has no effect, except so far, of course, as it may bring into operation any

(1) (1913) W. C. R. 268.

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general statutory enactment as to limitation which would apply to the case. Whether, in the case of a statutory right to compensation, there is any and what statutory limitation I am not quite sure, but I assume there would be; I do not express an opinion about it; whatever I say is subject to that; there may be a period of limitation beyond which the proceedings would be barred, but the special bar created by this statute is removed if it be shown that the delay to make the claim within the six months was occasioned by any of the circumstances referred to in the Act—namely, absence from the United Kingdom or other reasonable cause. Perhaps, before I leave the first question, I ought to say that I do not, of course, forget the dicta, to which my Lord has referred, of Duke L.J. and Eve J., but I agree with my Lord, and, with great respect to those two learned judges, I cannot accept the view which they have expressed.

With regard to the second point, which is whether the learned county court judge was right in finding that failure to make the claim within the six months was in this case occasioned by reasonable cause, the only finding, strictly speaking, which is material on this point is the one in which he says this: "Applying these principles to the case before me, considering that the applicant had given notice of the accidents, that the employers must be taken to have known all about them, that the applicant continued in their full employ practically without any absence from work until December, 1918, that she continued at the same kind of work as before, and earned more wages than previously, I decide that there was reasonable cause for not making the claim within six months." The grounds there stated appear to me to be insufficient to support the legal conclusion that, according to the true construction of the statute, her failure was occasioned by reasonable cause.

There is another view of the evidence which seems to me to lead to the conclusion that her failure to make a claim was not occasioned by reasonable cause. The part of the evidence upon which I rely is this: the first accident I think

we may put aside, as far as I can see; the trouble which has since happened did not arise from the first accident at all. The second accident happened on August 21, 1917. From immediately after that date, throughout the year and a half during which she was continuing at her work, she suffered constant and continuous pain. She knew that her foot was injured because she poulticed it at home, and deliberately abstained from going to the doctor because she was afraid that he would prick it, and, I suppose, either cause her pain or cause her to be laid up. She went on with her work, and apparently she was anxious that those in authority over her in the factory should not realize that she was suffering in any way likely to interfere with the work she was doing, because she says that the pain was such that she had to rest at times during her work, but when an official of the company came along she used to stand up. Now it seems to me that amounts to this, it cannot be said that the injury was a mere trivial injury, and that she had any reason to believe that it was a mere trivial injury. I think it must be taken that when she says she did not take the injury seriously or did not think it serious, that must be very strictly qualified by the evidence. That of course is an expression of what was in her mind, but that must be very strictly qualified by the facts deposed to by herself as to her actual conduct. I cannot think, seeing how she suffered from this injury and the effect it had upon her conduct, that the learned county court judge was justified in coming to the conclusion that the failure to make a claim was occasioned by reasonable cause. As I have said in former cases, it is the province of the county court judge to find what the facts are, and then, considering all the facts so found, to say whether according to the true construction of the Act the cause alleged was a reasonable cause. In my opinion, upon the facts as found by the learned judge, the conclusion of law that I have come to is that she has not shown that her failure to make a claim was occasioned by reasonable cause. I think therefore the decision of the county court judge ought to be reversed.

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SCRUTTON L.J. This case raises two questions, one of general importance and the other depending on the facts of the case. The question of general importance arises in this way. The workwoman alleged that she had suffered two accidents, the last of which was on August 21, 1917. Six months from the accident would expire on February 21, 1918. She made no claim till February 26, 1920. There is a provision in the Workmen's Compensation Act that proceedings shall not be maintainable for compensation unless the claim for compensation in respect of such accident is made within six months from the occurrence of the accident, followed by a provision that the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by "mistake, absence from the United Kingdom, or other reasonable cause." The appellants contended that in considering whether there is reasonable cause for failure to make a claim you do not have regard to the six months' period only, but you must look at the whole period up to the date of the claim. It seems to me, as it seemed to the Master of the Rolls, that there was a good deal to be said for the view that "claim" meant the beginning of legal proceedings, and then of course there would be no room for this argument, because such a claim must be made within the six months, and the period would be confined to that, but it having been decided that any claim, however informal, will do, though the legal proceedings may follow some months or years afterwards, it did become a question what was to happen as to the period between the expiration of the six months and the commencement of the legal proceedings.

It seems to me that the words are too strong to allow of appellants' contention succeeding. The failure to make a claim within the period above specified is the failure to make it within six months, and, if it is found that the failure was occasioned by reasonable cause, that must refer to a reasonable cause within the six months. If you have to do a thing on Monday it is no reason for not doing it on Monday to refer to something that happened on the Tuesday after. The reason why you

are prevented from doing the thing must happen during those six months, and I see no escape from the words of the section or the proviso, which appear to me to mean that you have to consider the period of six months during which the claim was not made, and then if there was reasonable cause for not making it within the six months the bar or limitation has gone and you are at large. It follows, as my brothers have said, that I am not able to agree with the dicta either of my brother Duke or my brother Eve, who have suggested that Parliament cannot have intended that. It is quite possible that Parliament did not intend it, because Parliament may have meant by "claim" the commencement of legal proceedings, in which case the question would not arise. But I can only judge of the intention of Parliament by the words it has used, and the words appear to me to be too strong to allow of the construction which the dicta of my two brothers would require should be put upon the section. So much for the question of general importance.

The question which is particular and peculiar to this case is, whether there was reasonable cause for the workwoman not making a claim within six months following August 21, 1917. Here again I am personally in very great difficulty. The learned county court judge read a passage from the judgment of the present Master of the Rolls in *Luckie* v. *Merry* (1) in which he used the expression "the making of the claim within the six months is really a pure technicality and formality and would affect nobody." Then he said: "Applying those principles to the case before us, considering that the applicant had given notice of the accidents, that the employers must be taken to have known all about them, that the applicant continued in their employ practically without any absence from work until December, 1918, that she continued at the same kind of work as before, and earned more wages than previously, I decide that there was reasonable cause for not making the claim within six months." Now that would apply to a case where there had been an accident, the consequences of which had ceased and where five years

(1) [1915] 3 K. B. 83, 90.

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afterwards a claim was made; there having been notice of the accident and the employers knowing all about it, and the applicant continuing in their employment at the same kind of work and earning the same wages; all those requirements might be fulfilled, and yet it must be quite clear, in a case like that, there would be no reasonable cause for postponing the claim for five years. I cannot help strongly suspecting that the county court judge has been led away, by the language used in *Luckie* v. *Merry* (1), into thinking that it was laying down a principle of general importance, instead of being, as I think it was, confined to that particular case in which, during the six months, the applicant had said to the employer: My doctor tells me I ought to make a claim for compensation, so that during the six months the employers had some notice of the claim.

Now I myself attach more importance to the claim for compensation than I gather, from his judgment, the Master of the Rolls does, although I am not certain that we really differ. It seems to me that the importance of the claim for compensation in these cases may be just as great as that of the notice of an accident. The workman may go on working at full wages and make no complaint, apparently doing his work perfectly efficiently for six months, and that may give the employer every reason to believe that nothing has happened in consequence of the accident, and in consequence of that he may destroy the evidence, or take no steps to get or keep any evidence which will enable him to deal with the claim when it is in fact made, and it seems to me that the making of the claim within six months, though notice has been given, is not a technicality, but is intended to inform the employer, so that he may be able to meet the claim when it comes into Court. I take the view that Lord Swinfen took in *Prophet* v. *Roberts* (2) where he said: "It is said that it is a mere technicality that the claim should be made within the period fixed by the statute, but I cannot so regard it." Then he says: "In my opinion, it is a substantial and material protection to the employer, and is not a pure

(1) [1915] 3 K. B. 83. (2) 11 B. W. C. C. 301, 308.

technicality or idle form." He quotes in support of that a passage from Lord Atkinson's judgment in *Thompson* v. *Goold & Co.* (1), which is a curious passage to cite, because Lord Atkinson in *King* v. *Port of London Authority* (2) has said something which looks different. Lord Atkinson says in the passage quoted: "And I should have thought it was equally plain that the main if not the only object of requiring the claim for compensation to be made within six months from the accident is to protect the employer from stale demands, to warn him that a claim is about to be made against him, and thus put him upon his guard, just as notice of action was designed to do the same thing in the case of those officials and public bodies who were under many statutes entitled to receive it." When Lord Atkinson in *King* v. *Port of London Authority* (2) dealt with the matter he then said: "A speedy notice of that kind is vital, but it cannot be of any great importance in almost any case from the employer's point of view whether the claim for compensation is made within the period of six months from the happening of accident or at a later period." I think Lord Atkinson must have forgotten that in *Thompson* v. *Goold & Co.* (1) he himself pointed out that the object of the claim is to put the employer on his guard, so that he may have an opportunity of immediately dealing with the matter and be protected from having stale claims made. I do not regard the claim as a mere technicality, and I rather think that the learned county court judge has not sufficiently considered, in view of the passage in *Luckie* v. *Merry* (3), which I think he has misunderstood as being wider than it really was, the real necessity for the claim.

Now what is the reasonable cause? In my view, although it may be a reasonable cause from the workman's point of view, he must consider both the interest of himself and that of the employer. He cannot say it is reasonable for me and I do not care what happens to the employer; he must take into account the fact that the absence of his claim upon the

(1) [1910] A. C. 409, 413. (2) [1920] A. C. 1, 24.
(3) [1915] 3 K. B. 83.

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employer is to put the employer in the difficulties I have pointed out.

I understand the cases to have decided that the fact that the workman is ignorant of his rights is not reasonable cause. I understand the cases to have decided that the fact that the workman is ignorant of his injury is a reasonable cause, that is in cases where there is an accident and latent injury which does not develop till afterwards. There is an intermediate set of facts where the workman knows of his injury, but thinks he will recover, and therefore does not make a claim. In that case it appears to me he is neglecting the interests of the employer when he fails to make a claim, and that that is the case which is alluded to by Hamilton L.J. in the passage which has been read from *Webster* v. *Cohen*. (1) I think, therefore, that it is not reasonable cause for a workman failing to give notice of his accident if he says: "I do not think I shall want to make a claim; I am sanguine about my recovery, and therefore I will not give notice of my accident." In that case it seems to me he is overlooking the interests of the employer, which require that the employer should have the chance of investigating the accident, and considering the point with the evidence upon it. In this case there is rather more than that. I cannot help suspecting from the evidence that the lady, who was earning very high wages, did not want to make a claim for fear that her wages should be stopped; she had pain the whole time, but when her employer's representative passed her she stood up, although she was sitting down because of the pain, so as to suggest that she was getting on with her work without anything being the matter with her. Although it may be capable of another interpretation, when she meets with her second accident and the shell fell on her toe, and she is away for a day she writes to say she had a sick headache, and does not say anything about the accident; it may be that she really had a sick headache; but it is also capable of the construction that she did not want to state anything which had happened to her toe, which might stop her from going on with the high

(1) (1913) W. C. R. 268.

wages which she was earning. Now in my view that is still less a reasonable cause than the state of things suggested by Hamilton L.J. The learned county court judge has not in my view found any facts which constitute reasonable cause; the nearest he finds to it is the passage on the first page of his judgment: "The toe discharged after the second accident and, although the applicant stated that she never had ease after the second accident, she continued at work until December, 1918." That is not a finding of any fact which might be enough to constitute reasonable cause, though, if there were a finding that the damage was really so trivial, that she was doing her work without any trouble and earning full wages, and thought there was nothing in the matter, it might be enough, but, in the absence of some such finding as that, it appears that it would not be fair to the employers that the workwoman should be allowed to keep on earning high wages without stopping off work for a time, which might possibly have cured the injury, and then have it decided that there was reasonable cause for her not giving the employer notice of claim within six months. As I say the question is one of some difficulty owing to the finding of the learned county court judge, and the somewhat conflicting dicta in the various authorities; but, upon the best consideration I can give the case, for the reasons I have given, I agree with the judgment of my brothers that this appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *The Treasury Solicitor.*

Solicitor for respondent: *H. F. Cornish, for J. E. Wing, Sheffield.*

G. A. S.

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